Technical Paper Number 57

REGULATION OF CRITICAL AREAS THROUGH A STATE LAND MANAGEMENT PROGRAM

September, 1975

RHODE ISLAND STATEWIDE PLANNING PROGRAM
265 Melrose Street
Providence, Rhode Island 02907

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This technical paper is one of a series prepared by the staff of the Statewide Planning Program. These papers present information developed through selected phases of work of the Statewide Planning Program to the program committees and staff, the participating state, local, and federal agencies, and to others interested.

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PREFACE

This paper explores an issue which is raised in the state land use report*: the need to regulate areas and activities of "critical state concern" as part of a state land management program. Further study and action on this issue is recommended in the land use report in section IV C, "A Strategy for Implementing State Land Use Policies."

Although this investigation is limited to critical areas, it should not be construed as advocating a separate program directed only to areas of critical state concern. A CRITICAL AREAS PROGRAM SHOULD BE UNDERTAKEN ONLY AS AN INTEGRAL PART OF A MORE COMPREHENSIVE LAND MANAGEMENT PROGRAM.

The paper also presents a possible institutional arrangement for administration of a state land management program. This is one of several possible approaches which are under study and should not be considered a firm recommendation at this time. Further study may indicate that this or some other approach is best suited to Rhode Island's needs. Alternatives are being evaluated more closely in drafting state land management legislation for introduction in the 1976 General Assembly session.

This paper was prepared by Edwin E. Taipale, Jr., a summer intern for the Statewide Planning Program with the sponsorship and financial support of the Audubon Society of Massachusetts, and A.Varin, a summer employee. They worked under the general supervision of Bradford E. Southworth, Supervising Planner (now resigned), and this report was guided and reviewed by Susan P. Morrison, Senior Planner, of the Program staff. Typing was done by Mrs. Ann B. Griffin. Tables were typed by Mrs. Janice Luther.

This report was carried out under work items 02024D, 02025, and 02026D, as described in the Rhode Island Statewide Planning Program's 1974, 1975, and current work programs.**

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* Rhode Island Statewide Planning Program, State Land Use Policies and Plan (Providence, Rhode Island: 1975).

** Rhode Island Statewide Planning Program, Work Program 1973-1974 (Providence, Rhode Island: 1973), and Work Program 1974-1975 (Providence, Rhode Island: 1974).

SUMMARY

Rhode Island's State Land Use Policies and Plan proposes that a state land management program be enacted which would establish general state standards for development and more specific standards for critical areas and activities of regional impact. This paper presents in greater detail the concept of critical areas regulation.

The subject is introduced in Part One, tracing the trend toward land use controls exercised at the state government level. The problem of defining areas and activities of critical state concern is discussed.

Part Two identifies possible types of critical areas and activities in Rhode Island. Ten types are described, in terms of how they are presently regulated and why they should be considered of critical state concern. The list is not intended to be final or all-inclusive but merely to indicate the scope of such a program and the background of related state law.

Part Three describes critical areas programs which have been proposed or implemented in national legislation, in the American Law Institute's Model Land Development Code, and in bills of fifteen states. These programs are analyzed in text and accompanying tables, as to eleven characteristics, including agency structure, types of critical areas and activities, regulatory procedures, and so forth.

Part Four presents recommendations for critical areas regulation in Rhode Island. The scope of regulation is proposed to encompass resource areas of statewide importance (historical, natural, or environmental), key facility areas (public facilities or services and surrounding area), and developments of statewide impact (large-scale development affecting more than a single municipality). The organizational structure to administer the program would consist of a land use commission with public, local government, and state legislative and executive members; a planning staff; and an administrative and enforcement staff. The regulatory procedure would involve designation or definition of critical areas and activities; recommendation of development standards; adoption of standards at the local level; and review of local standards by the state, which would regulate only if local controls were absent or inadequate. For development of statewide impact, an additional notification and review procedure would be followed. Enforcement, appeals, and administrative procedures would also be provided for. If a critical area or activity is already under state control, there would be dual jurisdiction. These recommendations are intended to protect areas of statewide importance, while insuring that development of benefit to the state can occur.

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PART ONE: INTRODUCTION

> Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.[1]

The relationship between property and the state dates back to the first governments formed by man and has been continually evolving ever since. The roots of our present system of property law are founded in the English Common Law and in the ancient feudal structures of government. Perhaps we can trace the thorny problem of the relationship of the state to private property rights to John Locke, who viewed the right to property as a natural right, and to Adam Smith, who, in his Wealth of Nations, espoused the view that property was an individual right to be protected, not regulated, by the state.

Property law has, of course, evolved considerably from the "Age of Reason" to the present, and there are few people, and certainly no lawyers, who would argue that the state has no business regulating the use of property. We are now, some would assert, entering an age of transition where traditional theories of the regulation of property and land use are being reexamined in light of the pressure for development and the conflicting uses of land which are the result of our advanced technology and our great prosperity.

A. THE EMERGENCE OF A STATE ROLE IN LAND USE CONTROL

There are also some who assert that it is time for state governments to recapture the power to regulate property, ceded to the local government in the zoning enabling acts of the 1920's and 30's. These writers argue that power to regulate land use has always been with the states, evidenced by the fact that no local zoning can be done without a state enabling act, and that it is a simple process to once again vest the primary responsibility for land use control with state government. Their position is expressed by a 1934 state court decision which found that:

> Clearly the theory of law in the United States, then, is that first and originally the state was the proprietor of all real property and last and ultimately will be its proprietor, and what is commonly termed ownership is in fact but tenancy, whose continuance is contingent upon legally recognized rights of tenure, transfer, and of succession in use and occupancy.[2]

Whether we need a reassertion of preexisting state control or the creation or evolution of a new system of land use regulation, it

is becoming increasingly apparent that our present mechanisms of land use control are not working as they should:

> Local government land use planning and regulation is administered through a system that has become inefficient and unwieldy; sometimes too responsive to special interests while apparently deaf to less articulate community desires . . . . More often than not the gears grind rather than mesh: the planning commission adopts plans, the local legislature grants amendments, and the board of appeals issues variances, all of which conflict with each other.[3]

In recent years the regulation and control of land use has been shifting, at least in certain areas, slowly and sometimes almost imperceptibly in the direction of state government. In 1961 the state of Hawaii enacted a statewide zoning program, dividing the state into three classifications: agricultural, conservation and urban. The State Land Use Commission developed the policies, and administers them in cooperation with the local governments (which are counties).[4] The impetus behind this radical departure from existing land use controls was largely the tremendous pressure for development put on the state's prime agricultural lands. The obviously finite land area of their island home made Hawaiians even more inclined to take a radical step toward efficient land use control.

More recently, a number of other states have taken significant steps toward state land use management, including California, Florida, Maine, Minnesota, New York, Oregon, and Vermont. The degree of state control in these programs differs greatly according to the different needs of the states and to the realities of their politics. However, with the possible exception of New York, all of these states have large amounts of undeveloped natural areas of great beauty which have been increasingly threatened by development. The economic pressure on the local government to permit development is usually overwhelming in light of the local government's reliance on property taxes.

Rhode Island is not, of course, subject to as great a pressure for development as a state like Vermont, Florida, or Oregon. Therefore, there has not been widespread public pressure for the state to step in and exercise some sort of land use control on a statewide basis. However, it would be a mistake to infer from this that Rhode Island need not concern itself with revising its land management systems. Rhode Island has a definite need for revision of its land use controls. The lesser pressure from development compared to a state such as Florida only means that Rhode Island has more

time to develop its system and may take a more thoughtful and comprehensive approach to the problem. Rhode Island should be part of a second wave of states adopting state land use management systems. This group includes, for example, Maryland, Iowa, and Arkansas, which have recently passed or attempted to pass legislation giving the state some control over land use. These states, like Rhode Island, are not under intense development pressure, but they recognize that without positive action the ecologically fragile areas of their states could suffer serious damage and that growth engendered by large industrial and commercial complexes needs more supervision than that provided by local governments, which are necessarily limited in their view.

This movement toward state control is not limited to a few states sensitive to the problems of land use planning. It is, rather national in scope. On a questionnaire distributed and written up in the Christian Science Monitor, 77 percent of the readers responding agreed that: "Where public benefits are demonstrable (as in areas of critical environmental concern), an appropriate level of government should be allowed to exercise increased regulatory powers over development, even to the point of prohibiting development outright."[5]

Of more immediate interest are the results of a goals and policies questionnaire sent out by the Rhode Island Statewide Planning Program to a sample of Rhode Islanders of diverse social and economic backgrounds.[6] The questionnaire was designed to indicate the importance which Rhode Islanders place on various state programs. In terms of general program areas, "Natural Resources and Environment" ranked third in importance, out of ten general programs, behind "Education" and "Health." In terms of specific programs, "Conservation and Protection of Natural Resources" ranked ninth out of 54, and "Water and Air Pollution Control" ranked first. This questionnaire was prepared in late 1973, and the returns came in early 1974. Therefore, the responses probably do not fully reflect reactions to the Navy Base closings and to the worsening economic situation. Nevertheless, the questionnaire indicates strong support by Rhode Islanders for state programs dealing with environmental protection.

B. APPROACHES TO DEFINING LAND USE OF CRITICAL STATE CONCERN

In response to the growing interest in improved land management, the American Law Institute initiated a program in 1968 to develop a Model Land Development Code to be used by states in the formulation of state land management systems. There have been several tentative drafts since then. Articles 7 and 8 of the Model Code

empower the state land planning agency to treat certain land development matters on a statewide or regional basis. These articles reflect the emergence of various state acts dealing with individual types of "critical areas," such as shorelines, and Article 7 is designed to assist states in finding a workable method for state and regional involvement without unnecessarily increasing the cost of the land development process. The Reporters who drew up the Model Land Development Code recognized that probably 90 percent of the land use decisions currently made by local governments have no major effect on the state interest, and they have therefore tried to balance the need for expanded state participation in certain decisions with the retention of local control over the great majority of matters which are of only local concern.[7] To aid states in determining what areas should be defined as of regional or state interest, the Code proposes three designations:

(1) Districts of Critical State Concern, such as tidelands, marshes, areas around major highway interchanges, and airport approach zones;

(2) Development of State or Regional Benefit, such as airports, public utility transmission lines, and major highways; and

(3) Large Scale Developments, which include any developments which may be of state or regional significance when undertaken on a large scale. (The Model Code is discussed in greater depth in Part Two of this report.)

The Model Land Development Code has provided a framework for many recent legislative acts, the most noteworthy perhaps being the land use bills introduced in the U.S. Congress. (These are also discussed further in Part Two.) It is sufficient to note at this point that the above three designations of areas of statewide significance are included in these national bills, although the "Udall bill" introduced in the House in 1974 (H.R. 10294), which failed to pass, subdivided the large-scale development category into large-scale developments and large-scale subdivisions.

The concept of "critical areas" is therefore a very general classification which can be limited or expanded to suit the requirements of a particular state. The only requirement is that the area in question have a signifiance which extends beyond the jurisdiction of the municipality in which it is located. A more exact definition of "critical areas" is difficult to formulate without enumerating the specific characteristics of each area. There are, however, general categories which can be defined based on the three classifications set forth in the Model Land Development Code:

(1) "Districts of critical state concern": Usually this classification refers to districts which, because of their value as natural areas or as important cultural or historical sites, are especially sensitive to deterioration due to unwise development.

(2) "Developments of state or regional benefit": The second classification includes those developments, usually public in nature, which offer substantial benefits to all the citizens of the state, or at least to the citizens of an area greater than the municipality in which it is located. This would include airports, public utilities, and water supply reservoirs, to name a few.

(3) Large-scale developments: This classification is difficult to define exactly. It can include any industrial, commercial, or residential development which is of such magnitude that it affects, either positively or negatively, a land area larger than the jurisdiction of the municipality in which it is located. This impact could be defined in terms of traffic congestion, air pollution, greater need for public services, greater need for housing, or impetus to the economic development of a region. If this definition proves to be too nebulous, then one in terms of total land area of the project, total number of proposed housing units, or the like could be established.

The identification of areas which might be considered of statewide critical concern is only the initial step in implementing a critical areas protection program. Perhaps the foremost concern in the development of any regulatory system is whether or not it will stand up to judicial testing. The courts, at least since Pennsylvania Coal Co. v. Mahon,[8] and probably long before that, have based their rulings regarding land use controls on the factual situation of the case in terms of the particular piece of land. Legal theories as to protection of the general welfare are usually not enough to pass judicial scrutiny. The courts do consider the purpose of the regulation in protecting the general health, safety and welfare, but the decisions usually turn on the impact which the regulation has on the property owner.

For these reasons, a law dealing with critical areas must be very specific. Specificity is desirable in all laws, of course, but especially so in land use laws due to the judicial test, and even more important in critical areas legislation since greater control over development in certain areas is required than under most typical zoning laws, and since critical areas legislation is, by definition, limited to certain designated areas. The landowner must know whether his land is a critical area or whether his proposed development has statewide or regional impact. Ideally then, each critical

area would be determined and mapped on the basis of scientific or technical knowledge, and the landowner would be informed of the classification. The problem with this method (besides its failure to recognize the subjective aspect) is that it requires a tremendous amount of data gathering and compilation before any regulatory system can be implemented. In most cases such complex data gathering has not even been started, although Rhode Island has already begun the mapping of several types of critical areas, such as wetlands, historic sites, and significant natural areas.

The alternative to a site-specific definition is to describe, as specifically as possible, what will be considered a "critical area," such as a wetland, a historic site, and so forth. The Rhode Island Fresh Water Wetlands Act has taken this approach to a definition; and, while it is open to charges of vagueness, it is at least a possible interim definition pending the development of a site-specific classification.

Of course, in defining large-scale development and, to some extent, key facilities, the classification cannot be site-specific. Therefore, the developer must be informed of what would be considered "large-scale development" or "key facilities." In these cases the developer should bear the burden of gathering data to show if a certain development meets the definition, since he is the one with best access to this information. The state need only establish the process for assuring that potential applicants for large-scale development are aware of the need to comply with certain requirements should it be determined that a large scale development is in fact involved. Since developers, in initiating anything approaching a large scale development, need local permits, notice could be given at the local level; and upon the developer's request for a determination of applicability, this determination could be made by either the state agency responsible for the supervision of critical areas or by a local agency, under guidelines drawn up by the state agency.

There is still the problem of deciding which areas should be "critical." One writer suggests a three-step process to make this determination.[9] First those natural areas of the state experiencing the greatest threat of destruction should be established. Second, a statewide evaluation should be made to examine the resource base, the sensitivity of the resource base in certain areas, the direction of development patterns, and the adequacy of existing controls. Finally, the municipal boundary lines should be examined to determine what types of critical areas transcend several boundaries, or where the benefits or burdens of critical areas are extraterritorial to the municipality.

Prior to this analysis of areas, however, it is important to identify existing state land use controls in Rhode Island affecting possible critical areas and to evaluate the controls in terms of the protection needed for these places. If the existing legislation is adequate, it would be needless duplication to superimpose another layer of regulation on the area. Therefore this report, before examining the ways in which other states and the federal government have attempted to protect critical areas, first will suggest possible types of critical areas in Rhode Island and will attempt to evaluate legislation dealing with these areas in terms of the protection needed if they were formally designated critical areas.

PART TWO: POTENTIAL CRITICAL AREAS IN RHODE ISLAND

This discussion of possible critical areas in Rhode Island is not envisioned to be all-inclusive. It is expected that, prior to any implementation of a critical areas regulatory system, this list may be altered considerably. This list was formulated by considering types of areas in Rhode Island which may need state regulation because they present special types of problems. Reference was also made to types of critical areas set forth in the Model Land Development Code, in the proposed federal acts, and in various state acts dealing with critical areas. The broad term "critical area" used here refers to all types of areas which might require some state regulation, including environmentally endangered areas, important historic sites, key facilities, and developments of more than local impact. These critical areas are discussed below in depth, mainly in terms of existing state legislation dealing with each type. The suggested critical areas for Rhode Island are:

(1) Coastal Areas
(2) Fresh Water Wetlands
(3) Conservation Areas
    a. State Management Areas
    b. Areas of significant natural interest
    c. Audubon properties
(4) Historic Areas
(5) Water Supply Areas
(6) Highway Interchanges
(7) Airports
(8) Public Transportation Facilities
(9) Public Utilities
(10) Large-Scale Development/Development of Regional Impact
    a. Industrial Sites
    b. Shopping Centers
    c. Large-Scale Residential Development Areas

The areas covered under these categories are not as extensive as it might appear. For example, it is not being suggested that airports themselves would be a critical area, but rather the area around the airport facility. Such differentiations will become more apparent in discussion of each critical area.

A. COASTAL AREAS

1. Coastal Resources Management Act

a. Legal basis for the act

Article 1, Section 17, of the Constitution of Rhode Island originally stated that:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted; nor any existing right impaired, by this declaration.

This section had been construed to guarantee to the citizens of Rhode Island the right to access to the shore for:

> fishing from the shore, taking seaweed and driftstuff therefrom, going therefrom into the sea for bathing, and also, as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore.[10]

In addition, this constitutional provision had been used to justify acts "for preservation of oysters and other shellfish within this state."[11]

In an amendment to the state constitution, adopted November 3, 1970, Article 1, Section 17, was expanded to state that:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

The Rhode Island legislature, in enacting the Coastal Resources Management Council Act in 1971, used this constitutional provision to justify the creation of the Coastal Resources Management Council. The legislative findings section of that act states that:

> . . . implementation of these policies is necessary in order to secure the rights of the people of Rhode Island to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and in order to allow the general assembly to fulfill its duty to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state. (General Laws of Rhode Island, Section 46-23-1)

It should be noted that while the original section 17 dealt with rights and privileges relating to shorelands, the amended section refers to the preservation and conservation of all natural resources, and therefore its use as justification for conservation or resource planning acts is not limited to those dealing only with shorelands.

b. Provisions of the act

Any listing of areas of critical environmental concern in Rhode Island must start with the coastal region. Rhode Island's coastline is its most obvious and one of its most important natural resources. It is for this reason that the legislature saw fit in 1971 to extend the power to regulate this resource beyond the local governmental structure, by establishing the Coastal Resources Management Council.

The Council consists of seventeen members appointed by the Governor, Lieutenant Governor, and Speaker of the House (General Laws, Section 46-23-2). The primary responsibility of the Council is the continuing planning and management of the resources of the state's coastal region. The resources management process of the Council includes the identification of all of the state's coastal resources, water, submerged land, air space, fin fish, shellfish, minerals and physiographic features; a determination of the current and potential uses and problems of each resource; the formulation of plans and programs for the management of each resource, identifying permitted uses, locations, and protection measures, and carrying out these resource management programs through implementing authority and coordination of state, federal, local, and private activities; anf finally the formulation of standards where these do not exist (General Laws, Section 46-23-6). All plans and programs formulated by the Coastal Council are to be developed around

basic standards and criteria including the need and demand for various activities and their impact upon ecological systems, their compatibility with other activities, and the capability of coastal resources to support them; water quality standards set by the Department of Health; consideration of plans, studies, surveys and inventories prepared by public and private sources, and consideration of contiguous land uses and transportation facilities; and finally, consistency with the State Guide Plan (General Laws, Section 46-23-6).

The authority of the Coastal Council to regulate development in water areas extends to any development which falls within, above, or beneath the tidal water below the mean high water mark, extending out to the limits of the state's jurisdiction in the territorial sea. A person, firm, or governmental agency must show that its proposed development would not conflict with any resources management plan or program or significantly damage the coastal environment. The authority of the Coastal Council over land areas is limited to specific activities or land uses which are related to the water area under the council's jurisdiction, regardless of their actual location, if there is a probability of damage to the coastal environment or of conflict with a resources management plan or program. The statute specifically spells out these activities and land uses. They include power generating and desalination plants; chemical or petroleum processing, transfer, or storage; extraction of minerals; shoreline protection facilities and physiographical features; intertidal salt marshes; and sewage treatment and disposal and solid waste disposal facilities.

In addition, the Coastal Council has the duty of consulting with and coordinating actions of various local, state, regional, federal, and private bodies including the Governor's office, the General Assembly, municipalities, and the public. Finally, the Coastal Council has the duty of issuing permits for development or licensing uses of the coastal resources within its juridiction and of investigating complaints alleging violation of state laws or riparian rights in the state's tidal waters (General Laws, Section 46-23-6).

c. Implementation of the act

The Council has adopted management plan policies and regulations on which to base its decisions. This series of policies, with eighteen chapter headings, provides a framework which can be expanded as detailed studies or plan elements are completed. To date the Council, through the Coastal Resources Center at the University of Rhode Island, has inventoried, mapped, and formulated management regulations for several types of areas (salt marshes, barrier beaches, and significant natural areas) and activities

(ocean mining of sand and gravel).

One of the Council's first experiences in using its power to regulate land uses and activities which relate to physiographical features of the shoreline (General Laws, Section 46-23-6-B (d)) has been to prohibit various residential and commercial developments along the barrier beaches. These denials of permits for development have resulted in litigation in a few instances, but as of this writing the power of the Coastal Council to prohibit development has not been held to be unconstitutional as a denial of equal protection or as a taking without compensation.

The Coastal Council has the power to issue cease and desist orders, and if the violator fails to do so he may be prosecuted in the District Court of the state. A person in violation of an order of the Council is guilty of a misdemeanor. In addition, the Chairman of the Council, at its direction, may bring suit in equity or by prerogative writ in the Superior Court (General Laws, Section 46-23-7). The Coastal Council also has the power to administer land and water use regulations and to acquire fee simple or less than fee simple interests under any federal or state program (General Laws, Section 43-23-15), but it has no eminent domain power.

The Coastal Resources Management Council is furnished with a technical staff under the provisions of the Rhode Island General Laws, Section 42-17.1-4 (d), which sets up a Division of Coastal Resources within the Department of Natural Resources. This division is responsible for carrying out the functions of the Department of Natural Resources relating to harbor and harbor lines, flood control, shore development, construction of port facilities, and the registration of boats. It is also responsible ". . . through the director of natural resources, to the coastal resources management council, and such chief and the staff of the division shall serve as staff to said council" (General Laws, Section 42-17.1-4 (d)).

A primary function of the Coastal Council is that of regulating development along the coastal area. To fulfill this statutory responsibility the Council has authority to issue or deny permits for any development which falls within their jurisdiction as defined in the General Laws, Section 46-23-6 (B). Although the statute does not say when this permit authority is to be exercised, the Council has made it a practice to not consider an application for a permit until the local (usually, building inspector) and/or state (usually, Department of Health) governmental bodies involved have had a chance to exercise their authority. This is in line with the Council's stated policy to consult with local governments and to consider any information which the local government might make available to the Council before it makes a decision.[12]

d. Evaluation of the act

In the twelve months following the establishment of the Coastal Council in July of 1971, the Coastal Resources Division of the Department of Natural Resources received 73 applications for development permits, up 36 percent from the previous year. From July, 1972, to July 1973, it received 116 applications, an increase of 24 percent. Obviously, the creation of the Council has not slowed down the pressure for development along the coast, but it has probably slowed the rate of development, for while the rate of applications has increased at a high rate, the number of assents has increased at a much slower rate. In the fiscal year ending in July, 1972, assents had increased 20 percent from the previous year, while in the fiscal year ending in July, 1973, the rate of assents actually went down from the previous year and was only a 7 percent increase from the 1971 level.[13]

While the Coastal Council may have slowed the rate of development in its jurisdiction, it also encountered some difficulty in the performance of some of its duties. There had been some hostility with local governments during the early stages of the program. Some difficulty must, of course, be expected in working with a new program, but frequent and informal communication can do much to alleviate many of these difficulties.

Another problem, perhaps more serious, has been the lack of an adequate staff in the Coastal Resources Division of the Department of Natural Resources. In July of 1971 the staff consisted of the division chief, a civil engineer, and a secretary. In July of 1973 the staff was the same, yet they were handling approximately a 59 percent increase in applications. It has been suggested that this lack of staff caused the slower rate of assents than applications.[14] If this is correct, then the resulting slower rate of development was not the result of any affirmative action of the Coastal Council but was caused by administrative inefficiency in processing applications. While the end result is the same, a land use program can only be truly effective if decisions are based on responsible planning considerations. The slowdown of development through the burden imposed by additional bureaucratic paperwork is neither fair to the potential developer, nor in the best interests of the public which should have its planning decisions made by an evaluation of all relevant facts. This is not to say that the decisions made by the Coastal Council have not been made fairly after consideration of all the relevant material. This discussion is directed more at the lessons to be learned by the experience of the Coastal Resources Management Act. When a land use program is implemented by the state, it should have the necessary funding and staff to carry out its legislative directive. To do less is to do a disservice to developer and public alike.

It must be noted that the staff of the Coastal Resources Division has been enlarged since 1973, and its backlog has been considerably reduced. This staff now spends approximately 80 percent of its time in processing applications. This in itself could be a solution to the staff problem of the Coastal Council. Again it must be emphasized that this discussion is not a criticism of the Council but an attempt to learn from its experience as a land use regulatory body.

2. Other Coastal Area Legislation

The Coastal Resources Management Act is not the only legislation dealing with the coastal area of Rhode Island. There are two other acts dealing specifically with coastal land use: the Coastal Wetlands Act and the Intertidal Salt Marsh Act. Both of these statutes were originally enacted in 1965; both cite Article I, section 17, of the Constitution of Rhode Island (prior to its amendment) as constitutional authority; and both deal generally with the same area. There are, however, important differences in terms of their design and effectiveness.

a. Coastal Wetlands Act

The Coastal Wetlands Act, like the Coastal Resources Management Act, cites "the public policy of this state to preserve the purity and integrity of the coastal wetlands of this state" (General Laws, Section 2-1-13). It defines a coastal wetland as "any salt marsh bordering on the tidal waters of this state, whether or not the tide waters reach the littoral areas through natural or artificial water courses, and such uplands contiguous thereto, but extending no more than fifty yards inland therefrom, as the director shall deem reasonably necessary . . . ." (General Laws, Section 2-1-14). The section defines salt marsh in terms of the vegetation growing on it.

The act sets up a program whereby the Director of Natural Resources can designate areas as coastal wetlands by written order, and no use of the land should be allowed which is not compatible with the public policy of the state as set forth in the order. There are, of course, provisions for public hearings on the order, and the order must be recorded in the Registry of Deeds where the land is situated (General Laws, Section 2-1-15).

The act, however, is totally emasculated by the section relating to damages, which states that if an order of the Director of the Department of Natural Resources causes an owner of land to suffer damage, ". . . such owner may recover compensation for such damage in an action filed in the superior court within two years from the date of recording of such order". (General Laws, Section 2-1-16).

The awards of damages are to be paid from funds appropriated by the legislature to carry out the purposes of this act, or from the recreation and conservation land acquisition and development fund of 1964.

Because of this provision, the Coastal Wetlands Act has never been implemented. The major reason is that the legislature never appropriated the funds to pay awards for damages, and there have never been adequate funds in the recreation and conservation land acquisition and development fund of 1964 to support this act, as these funds have been earmarked for higher priority uses.

It has been proposed by the New England River Basins Commission that a number of amendments and appropriations could be made relating to this bill to make it effective. These include: appropriation of funds for damages; provision for the state to withdraw or modify an order if it is unable to pay damages; preparation of a useful inventory of coastal wetlands; setting of specific penalties for violation of an order; amendment of the law to allow for lower tax assessment for land subject to permanent wetlands restrictions; and, finally, incorporation of a statutory test to determine whether a taking has occurred, such as when an owner is denied all economic use of the land or all reasonable use.[15] There is, however, a policy consideration to be made as to whether or not this act should be revitalized. The Coastal Resources Management Council now has jurisdiction over most, if not all, of the coastal wetlands covered by the Coastal Wetlands Act. It is the position of this paper that at this point some attempt should be made to centralize the regulation of areas of critical concern for purposes of clarification and efficiency.

b. Intertidal Salt Marsh Act

In the same year that the legislature enacted the Coastal Wetlands Act (1965), it also passed the Intertidal Salt Marsh Act (General Laws, Chapter 11-46.1). The Intertidal Salt Marsh Act essentially covers the same type of area as the Coastal Wetlands Act, although its jurisdiction is limited to the marsh itself, rather than contiguous uplands. As was previously stated, the reasons for its enactment were essentially the same as for the Coastal Wetlands Act. As amended in 1969, the act provides for a $500 fine for anyone who dumps or deposits mud, dirt, or rubbish or excavates and disturbs the ecology of the salt marsh without first obtaining a permit from the Department of Natural Resources. It further provides for a $50 fine per day for any person in violation of an order of the Director of the Department of Natural Resources to cease dumping or excavating. Finally, it provides that upon complaint of the Director of Natural Resources filed in Superior Court, any person who disturbs the ecology of a salt marsh may be

required to restore the marsh to the extent practical. The act defines an intertidal salt marsh in terms of its vegetation and the existence of salt marsh peat.

Again, the New England River Basins Commission has proposed some changes in this law to make it more effective. One recommendation is that the peat requirement for defining a salt marsh be removed, since many salt marshes do not contain peat. The River Basins Commission also suggests that the burden of proof be placed on the applicant rather than on the state to show that his actions will not disturb the ecology; that the act be amended to apply also to brackish water areas and intermixed salt and fresh water marshes; and that a wetland with a permanent restriction be reassessed for property tax purposes. In addition it was suggested that provision be made for compensation to the landowner if the denial of a permit constitutes a taking of property, and that the state have the option of withdrawing or modifying its order if it is unable to pay compensation.[16] These suggestions are well taken.

This act takes a different approach to the wetlands problem from either the Coastal Resources Management Act or the Coastal Wetlands Act. While the authority to issue permits now falls to the Coastal Council under Chapter 46-23 of the General Laws, the act did provide a means of enforcement which would not otherwise be available and protects against despoliation of the marsh while any court action may be pending, by its requirement for restoration. It also differs from the Coastal Wetlands Act in that it has actually been used.

The constitutionality of the act has yet to be challenged in the courts, so that the question of compensation for damages resulting from inverse condemnation has yet to arise. However, the providing of funds for compensation or the option to rescind the order could avoid any future legal challenge which might endanger the effectiveness of the Intertidal Salt Marsh Act. Of the two the option to rescind is probably preferable in that it does not require a legislative appropriation. It is not necessarily preferable for a state to rely on only one method of controlling wetlands development, and there are often advantages to a multi-faceted approach. The coexistence, in fact the integration, of the Intertidal Salt Marsh Act and the Coastal Resources Management Act demonstrates the viability of the Intertidal Salt Marsh Act in conjunction with other land use regulatory systems.

B. FRESH WATER WETLANDS

1. Provisions of the Act

The Fresh Water Wetlands Act was enacted in 1971, and amended in 1974, to protect against dangers of flooding and to preserve fresh water wetlands as wildlife habitats and recreational areas. The protection of flood plains and wetlands was deemed essential "to the health, welfare, and general well being of the populace" and therefore was justified as a proper use of the police power of the state (General Laws, Section 2-1-19). The act has a dual purpose. The first is the regulation of flood plains to insure that the dangers incident to floods do not increase because of unsupervised development in areas subject to flooding. The second purpose is the preservation of fresh water wetlands as environmentally unique areas capable of providing recreational opportunities for the citizens of the state and, more importantly, of providing a wildlife refuge necessary for preserving the ecological balance.

There is no question that fresh water wetlands and flood plains should be included in any list of critical areas of statewide concern. Their preservation is a matter of more than local significance because of the considerable benefits they provide to the state and because they often cross local jurisdictional boundaries. Furthermore, the tool of local zoning has proved wholly inadequate to deal with the extra protection needed for the preservation of fresh water wetlands.

The Fresh Water Wetlands Act defines fresh water wetlands as including, but not limited to:

> marshes; swamps; bogs; ponds; rivers; river and stream flood plains and banks; areas subject to flooding or storm flowage; emergent and submergent plant communities in any body of fresh water including rivers and streams and that area of land within 50 feet of the edge of any bog, marsh, swamp or pond. (General Laws, Section 2-1-20).

The act defines marshes, ponds, bogs, and swamps in terms of area, vegetation, and presence of water. Two significant changes in the definition were included in the 1974 amendment to the act: in the definitions of "flood plain" and "river bank". The term "flood plain" was first defined as a 50 year flood plain, but the 1974 amendment changed it to a 100 year flood plain, or, in other words:

> that land area adjacent to a river or stream or other body of flowing water which is, on the average, likely to be covered with flood waters resulting from a 100 year

frequency storm. A 100 year frequency storm is one that is to be expected to be equaled or exceeded once in 100 years; or may be said to have a 1 percent probability of being equaled or exceeded in any given year. (General Laws, Section 2-1-20, as amended in 1974).

This amendment gives the Department of Natural Resources control over a larger area than previously, since a 100 year flood plain covers a greater area than a 50 year flood plain. The definition of "river bank" which was in the original act was: "that area of land within two hundred feet of the edge of any flowing body of water and a twenty foot contour line drawn parallel to the stream bed thalweg, whichever is closer" (General Laws, Section 2-1-20, as enacted). The 1974 amendment kept the requirement of 200 feet from the "edge of any flowing body of water", as long as that body of water has a width of ten feet or more. For any flowing body of water less than ten feet wide, the river bank, for the purposes of the act, extends only 100 feet from the edge. The alternative of defining the bank as extending to the twenty-foot contour line drawn parallel to the stream bed thalweg was dropped.

The 1974 amendment to the Fresh Water Wetlands Act also authorized the director "to determine which areas are to be known as wetlands and to maintain a map survey of the State of Rhode Island that indicates the wetland areas" (General Laws, Section 2-1-20.2). A listing of fresh water wetland areas has been drawn up and mapped by the Department of Natural Resources on the scale of one inch to one thousand feet. This inventory is not, however, all-inclusive for the purposes of this act in that there may be fresh water wetland areas covered by the law that are not included in the inventory.

The act requires the approval of the Director of the Department of Natural Resources before anyone (person, firm, industry, company, corporation, city; town, municipal or state agency, fire district, club, non-profit agency, etc.) can excavate; drain; fill; dump; divert water flows into or out of; dike; dam; divert; change; or otherwise alter the character of any fresh water wetland. The Director will deny approval if, in his opinion, it would not be in the best public interest, or if the city or town council which has jurisdiction disapproves within the 45 days provided for objections (General Laws, Section 2-1-21 (a)). The 1974 amendment to this section expands it to say that if approval is denied by the Director of Natural Resources or by the city or town, the landowner may petition the Superior Court to have the state, or the city or town, acquire the land. If the court finds that the proposed alteration would not essentially change the natural character of the land, would not be unsuited to the land in the natural state, and would not injure the rights of others, it shall determine the fair market value of the land, as a wetland, and order the state or the city or town to pay that amount to the landowner for compensation. If

only the state denies the permit only the state need pay compensation; the same holds true for a town or city. If both the state and the city or town deny the permit, then they share the cost equally. If the state, or the city or town, or both decline to pay compensation, then the landowner may go ahead and alter the wetland as initially requested (General Laws, Section 2-1-21 (b) as amended in 1974).

The major difference between the fresh water wetlands act, as initially passed, and the coastal wetlands act was the provision for payment of damages. As previously stated, the inclusion of this damages provision is the major reason the coastal wetlands act was never implemented, since the funds were never appropriated. However, the damages provision of the amended fresh water wetlands act states that "any amount paid by the state hereunder shall be paid from any funds in the treasury not otherwise appropriated." In addition, the state can decline to pay damages and allow the development to proceed. While this will not preserve the wetlands it will preserve the act even if there are no funds to pay damages.

2. The Taking Issue and the Fresh Water Wetlands Act

The New England River Basins Commission has suggested that this provision is not going to bypass the taking issue, since the criteri used to determine compensation are the same as those used by the decision-making agency when first ruling on the application. The suggestion of the New England River Basins Commission seems to be directed at the fact that the statute only spells out guidelines as to what may be an overreaching of the police power under the act. It ignores the fact that traditionally the question of what constitutes an unconstitutional taking has revolved on a balancing test, originally set forth by Justice Holmes in the landmark case of Pennsylvania Coal Co. v. Mahon (1922) 260 US 393). The validity of a police power regulation; that is, a regulation enacted for the general health, safety or welfare, must be weighed against a number of factors, the preeminent one perhaps being the extent of diminution of the value of the property. The preservation of wetlands is a laudable state objective and one by which the entire state benefits, but if the burden of providing this benefit falls disproportionately upon the landowner then such an exercise of the police power is unreasonable. This was the result reached by the courts of Maine and Connecticut in the cases of Maine v. Johnson (1970) 265 A. 2d 711) and Bartlett v. Zoning Commission (1972)2 ERC 1684), respectively. While there have been court cases in Wisconsin and California which have produced contrary results, it is more probable that Rhode Island courts would follow the lead of other New England state courts.*

* Since the above was written, the New Hampshire Supreme Court has upheld that state's wetlands act, following the Wisconsin decision which found a taking not to occur, based on the allowing of traditional (non-intensive) uses and on the harm to the public which would result from allowing development.

The Fresh Water Wetlands Act, as it is now written, implies that the Superior Court can refuse to award compensation if the proposed alteration would essentially change the natural character of the land, would be unsuited to the land in the natural state, and would injure the rights of others. This is essentially a test to see if the Department of Natural Resources applied the correct standards under the act. It does not address itself to the question of whether the action or the act itself is an unconstitutional use of the police power in that it constitutes a taking without compensation. A proposed alteration could change the natural character of the land, but if its denial leaves the owner with no reasonable use of the land it could still amount to a taking for which compensation is required. This Section 2-1-21 (b) of the Fresh Water Wetlands Act is essentially an expansion of the Administrative Procedures Act, Section 42-35-15 of the General Laws, which allows for judicial review of an administrative ruling. The only difference is that the wetlands act section allows the state to buy the land if it cannot legally prohibit its development. The section is then, in effect, a conferral of a sort of eminent domain power, although that is certainly not its intent.

Apparently, at least part of the intent of the amended section was to prohibit the local government from denying permits without sufficient justification under the guidelines of the act. While it was not clear from the original act what standards the local government was to follow under the act, the amendment makes it clear that, at least for purposes of Section 2-1-21 (b), the local government will be held by the Superior Court to the same standards as the state Department of Natural Resources. This is most probably the standard to which they would always have been held. Judge Weisberger on October 5, 1973, prior to the adoption of the 1974 amendment, ruled, in the case of Mills v. Murphy (Superior Court, Civil Action File No. 73-1305):

> that a city or town council cannot disapprove such an application unless it fails to be consistent with the public interest; and therefore, that the city and town councils are controlled by the same general guidelines in the act as is the director.

It is difficult to see how the court could have reached any other decision. As the court pointed out, if the directive in the act for the local government to apply the standards set forth in the act is not explicit, then it is at least implicit in the language of the act. The 1974 amendment to the Fresh Water Wetlands Act makes this duty more clear, and it makes clear the duty of the local government to pay compensation if it violates these standards.*

* Since the above was written, the question of local standards has been raised again in another Superior Court case.

Again, it must be noted that there could be a judicial determination of an unconstitutional taking even with full compliance with standards set forth in the amendment to the act. This remedy was available to the landowner prior to the amendment, according to Judge Weisberger: "The Court is of the opinion that it (the local government) has the obligation to construe the statute in order to conform with constitutional principles if such construction is possible" (Mills v. Murphy, supra).

When the case history of the requirement for compensation indicates that a stricter standard must be applied than the one set forth in this act, it naturally raises the question as to what is the usefulness of this section of the act. The answer to this lies in the value of the streamlining involved in this section. Section 2-1-21 (b) makes the judicial appeal from a local decision under the Fresh Water Wetlands Act the same as an appeal from a decision of the Department of Natural Resources, and in the case where both the state and the city or town deny the permit there is only one appeal to the Superior Court. A streamlined review process such as this is especially useful in cases where there is concurrent state and local jurisdiction, and it is especially relevant to the scope of our inquiry here. In terms of streamlining, it is also often useful to review application procedures, where both a state and local application is needed, to determine if a one-step application procedure could also be initiated.

3. Application and Regulation Procedures under the Fresh Water Wetlands Act

According to Section 2-1-22 of the Fresh Water Wetlands Act, the Director of Natural Resources is to draw up and provide the application form under the act. Prior to application, upon request, the Director can make a preliminary determination as to whether the wetlands act applies. Any application must be accompanied by plans and drawings of the proposed project, prepared by a professional engineer. Upon receipt of an application the Director must notify all abutting landowners; the city or town council, conservation commission, planning board, zoning board, and any other individuals and agencies in any towns within whose borders the project lies who may have reason in the opinion of the Director to be concerned with the proposal; as well as any persons or agencies who wished to be notified of all applications. The Director is to establish a mailing list for this last purpose.

If the Director receives any objections to the project within 45 days of the mailing of the notice of application, he must schedule a public hearing and inform all objectors of the date, time, place, and subject matter. He must also publish a notice of the meeting in a local newspaper. The act states that the Director must notify

the applicant and any objectors of his decision within six weeks. If a public hearing is held, it is pretty clear that the six weeks begins from that hearing date. If a public hearing is not held, it is not clear from the language in the act exactly when this period begins. Presumably it would be after the 45 day waiting period after the Director mails his notices of the application. This section should perhaps be amended to make the time periods more clear. The permit, if issued, remains in effect for one year. A request for a renewal must be made 90 days prior to the expiration of the old permit and must use the same form and procedure as the original application except that there need be no new hearing if the Director determines that it is not necessary.

If anyone violates Section 2-1-21 of the act; that is, if any of the operations with respect to a fresh water wetland, including filling, draining, or excavating, are done without a permit, then the Director of Natural Resources can issue a written cease and desist order. In addition, he can order the violator to restore the wetlands as much as possible or can have the restoration done and hold this violator liable. If an order is not complied with, the Director may bring prosecution by complaint and warrant in the District Court. In addition, the Director can obtain relief in equity or by prerogative writ in the Superior Court whenever it is necessary to carry out any of his duties under the act. A violation of an order of the Director is punishable by a $500 fine and imprisonment for 30 days or both, and each day the violation is repeated or continued is a separate offense (General Laws, Section 2-1-24). This penalties section was strengthened from the original section (Section 2-1-23, repealed in 1974) to allow the Department to issue, on the spot, written cease and desist orders. This presumably makes enforcement of the act quicker and easier.

4. Evaluation of the Fresh Water Wetlands Act

The Fresh Water Wetlands Act is currently fully operational. Written cease and desist orders have been issued where applicable, and orders for restoration have also been issued. As of this writing there are also a few criminal actions pending against offenders under the act. The enforcement provisions of the Fresh Water Wetlands Act are currently stronger than those of any of the other acts relating to coastal areas and wetlands, including the Coastal Resources Management Act. This could be because of a greater state interest in fresh water wetlands than in saltwater wetlands, but, more probably, it results from the recent increased emphasis on environmental protection (this is the latest significant amendment to any wetlands act). In other words, it could be inferred that the legislature is increasingly more predisposed to enacting strict land use regulations for environmentally endangered land areas.

The New England River Basins Commission has suggested that the Fresh Water Wetlands Act could be improved by increasing the number of staff biologists and conservation officers to handle the growing number of applications; by establishing detailed standards and criteria for wetland use and alteration through the development of baseline inventory data to guide both the Department and the applicant; by reworking the provision for compensation which has been discussed previously; and by providing that local tax assessors must reassess any fresh water wetland, aquifier, etc., to reflect any permanent restriction on the property.[17]

The Department of Natural Resources feels that it currently has sufficient staff to handle the applications. Detailed regulations for wetland use and alteration have been developed, and the Department has no objections to the reassessment of fresh water wetlands for property tax purposes (it is likely that local governments and assessors would have considerable objection). The suggestion that the provision for compensation be further amended to deal better with the issue of taking has not really been considered by the Department of Natural Resources at this time.[18] This could be because of a misunderstanding of the legal issues involved.

The fresh water wetlands control program is yet another operating program dealing with a critical environmental area which must be incorporated into a general critical areas program. This should be done in such a way as to deal with or solve the problems facing the current program, without losing any of the workability or efficiency of the present program. The Fresh Water Wetlands Act points up the need to develop a program which will provide compensation for landowners whose property is taken as a result of regulation but only when there is a real taking involved. Any new land use regulatory system must be built on and learn from the experiences of existing programs.

C. CONSERVATION AREAS

The designation of conservation areas as critical areas of statewide concern is misleading because the definition of conservation areas, for the purposes of this report, includes some areas which are more recreation-oriented than conservation-oriented. The definition also does not include areas such as wetlands which could certainly be categorized as conservation areas but have been included in another, more specific category such as fresh water wetlands or watershed areas. The conservation area designation is therefore a catchall, encompassing areas which are presently being

maintained, or should be maintained, in their natural state. It includes some state-owned open space areas under the jurisdiction of the Department of Natural Resources, areas of significant natural interest, and Audubon properties. The range of land ownership extends from state-owned land to land owned by private conservation organizations to land owned by private individuals. These areas are critical because of their value as wildlife preserves, recreation areas, or areas where the natural features of the land are so important or unique that the area should be preserved in its natural state.

The designation of these areas as critical envisions two types of control. The first is the drawing up of guidelines for the preservation of the actual area, such as a place of significant natural interest. The second type of control is the drawing up of guidelines to insure that the land use of adjacent areas is compatible with the conservation area. This second type of control is needed to insure that the quality of the conservation area is not destroyed by nearby development. This is not to say that all development should be prohibited in these adjacent areas. Such a restriction would often not be necessary and would be impossible to defend against an argument of an unconstitutional taking, whether the restriction were imposed by the state or the local government. Instead, only development which would not endanger the value of the conservation area should be permitted. The extent of the development allowed would depend upon a number of factors. Preeminent perhaps is consideration of the use of the conservation area. An area used for recreation would be compatible with more varied land uses than would a wildlife sanctuary. Low-density residential uses would probably have the least impact upon conservation areas, but certain types of commercial or industrial uses might also be compatible, if strictly controlled.

The existing land use controls over these areas range from virtually total private control to total state control. The private control exists with respect to the Audubon Society's wildlife refuges and natural areas. This land is, of course, subject to local zoning, but since the land is held as open space there is no danger of development. There are currently seven wildlife refuge areas in Rhode Island and twenty-five open space areas owned by the Audubon Society. The refuge areas, besides providing sanctuary for wildlife, also are used for environmental education programs and some low-intensity outdoor recreation. The open space areas are generally unsuitable for public use, and the chief objective is usually to maintain land in its natural state, sometimes to act as a buffer zone against development in certain areas. The Cocumscussoc Brook Reserve is an example, being next to a state park. Needless to say, there is no need for the state to exercise control over such areas, since their preservation as open space is assured as long as they remain

under the control of the Audubon Society. However, some of these areas are very small, in some cases only three acres. The control of adjacent land use is necessary if their value as open space or refuge areas is to be preserved. The refuge and open space areas are maintained by the Audubon Society for the benefit of all citizens. The state therefore has a valid interest in insuring that the benefits which these areas provide to Rhode Islanders, at no cost to the state, are not lost because of unwise land use planning.

In 1972 a Rhode Island natural areas survey was completed.[19] Part of a regional study coordinated by the New England Natural Resources Center, the project was prepared in this state by the Audubon Society of Rhode Island. Its purpose is to "assist in the preservation of natural features which may be threatened by commercial and industrial development or by environmental forces".[20] The report does not put forth any program to regulate these areas. Rather, it identifies, describes, and evaluates a total of 219 areas. The report suggests that these areas could be included in the U.S. National Register of Natural Landmarks or that a state register of significant natural sites could be established. (It should be noted that entry on the National Register of Natural Landmarks imposes no control over the privately owned areas but only assists in their preservation if the landowner desires the assistance.)[21] The inclusion of the significant natural sites within a statewide system of critical area regulation would aid in preserving the integrity of these areas. The regulation could be carried out in the same manner as regulation of historic places. The value of these areas to the state for conservation, scientific, and aesthetic purposes cannot be disputed. Whether they can be sufficiently preserved through a regulatory system based on zoning principles is not certain but in the absence of legislative appropriations for their acquisition it is better than no control at all. Of course, without the willingness of the state to pay compensation, any regulatory guidelines must leave the owner with some beneficial use of his property. Perhaps it is in this situation that a system of transferable development rights[22] might be considered in order to provide an incentive for the preservation of significant natural areas.

The final classification within this general category of conservation areas, besides Audubon properties and "natural areas," is that of the state management areas. The Department of Natural Resources has the broad powers:

> to supervise and control the protection, development, planning; and utilization of the natural resources of the state, such resources including (but not limited to) water, plants, trees, soil, clay, sand, gravel, rocks and other minerals, air, mammals, birds, reptiles, amphibians, fish, shellfish, and other forms of aquatic, insect and animal life.[23]

The Department of Natural Resources includes (among others) a Division of Parks and Recreation with responsibility for the operation and maintenance of parks and recreation areas; a Division of Fish and Wildlife, with responsibility for administration of hunting, fishing, and shell fisheries, as well as the preservation of wetlands, marsh lands, and wildlife; a Division of Planning and Development which carries out the functions of the Department related to planning, programming , acquisition of land, and engineering studies; and a Division of Forest Environment, which carries out those functions "relating to the administration of forests and natural areas, including programs for utilization, conservation, forest fire protection, and improvements of these areas."[24] All of these divisions therefore have a concern in the control of the state management areas. In places such as the Arcadia Management Area, which has recreational, forest, and wildlife conservation areas, the Division of Parks and Recreation as well as the Division of Fish and Wildlife and the Division of Forest Environment have an interest in the management.

In addition to these general powers and duties of the Department of Natural Resources under Section 32-1-2 of the General Laws, the Department has authority to acquire lands for parks, recreation grounds, or bathing beaches by purchase, gift, devise, or condemnation. The funds for this acquisition are supposed to come from an annual appropriation by the legislature. The legislature has never appropriated monies for this; but Section 32-1-11 of this same act sets up "the recreation area development fund" which allows for 50 percent of all user and concession fees collected from any state owned beach, park, or recreation area to be deposited in the fund. This section has been somewhat eroded by Section 42-17.1-9.1 of the General Laws, enacted in 1973, which authorizes the Department of Natural Resources to charge parking fees at state beaches. Annual fees collected by this system are to be retained by the state and used for the maintenance, improvement, and acquisition of beach facilities. All other fees (daily fees) are to be distributed one-quarter to the municipality and three quarters retained by the state. This section was enacted later than Section 32-1-11 and thus supersedes it for purposes of beach acquisition. Presumably "the recreation area development fund" is still effective for park and recreation areas other than beaches. The major question involving Section 42-17.1-9.1, although not of the greatest impact for the purposes of this report, is to what extent these fees can be used for the acquisition of barrier beaches, on which, presumably, no parking facilities or intensive recreational use would be encouraged. In other words, the fund is for beach facilities and not for conservation areas. If this fund can be used to acquire barrier beaches, however, largely for conservation purposes, it would provide a source of funds to the Coastal Resources Management Council if their regulations were held to be an unconstitutional taking of property.

This provision would strengthen the Coastal Resources Management Act. As of this writing the fund has not been used for such purposes, and the question of whether this is an appropriate use of the fund has not yet arisen.

Some barrier beaches have been acquired under the "Green Acres Land Acquisition Act of 1964." Under the act the General Assembly found that:

> Providing land for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare, and is a proper responsibility of government.[25]

The act provides that the Director of Administration "or his designated representative"[26] shall use the funds appropriated by the act to acquire lands for recreation and conservation purposes and to make grants to assist local units to acquire such lands. Since that time, the Department of Natural Resources has been designated as the agency responsible for carrying out the purposes of the act.[27] The act gives the Director the power of eminent domain to carry out the purposes of the act. Although through bond issues a number of conservation and recreation areas were acquired under the act, both by the state and cities and towns, there are currently no remaining uncommitted funds to carry out the program.

There is, obviously, no need for additional state control over open space areas which it already owns and manages; and the Department of Natural Resources is probably the appropriate agency to maintain control over these areas. However, state management areas, like the Audubon refuge and open space areas, are susceptible to degradation from the unwise use of adjacent land. For this reason some guidelines for development should be set up by the state, after considerable input from the Department of Natural Resources, as to what types of development might adversely affect the management areas. The quality and degree of development near state open space areas is of critical concern to all the citizens of the state.

D. HISTORIC AREAS

The need for preservation is not limited to the natural environment. The preservation of historic buildings and areas is important if the citizens of the state are to appreciate social and cultural heritage. In 1968 the legislature created the Historical Preservation Commission, finding that:

> the historical, architectural and cultural heritage of the state of Rhode Island should be preserved as a part of our life to enrich the experience of present and future generations, and that the continued expansion of urban development threatens the existence of our historical sites and structures.[28]

In addition, the legislature found in an earlier act that: "the preservation of structures of historic and architectural value is hereby declared to be a public purpose . . . ."[29] There is a strong argument to be made for the intent of the legislature to exercise some control over the preservation of historic areas and buildings, and therefore a strong argument for the inclusion of historic areas and sites in the state's designation of critical areas.

1. Historic Area Zoning

The first action by the Rhode Island legislature dealing with historic areas was the Historic Area Zoning enabling act, passed in 1959. This law was enacted in order to:

> (a) safeguard the heritage of such city or town by preserving a district in a city or town which reflects elements of its cultural, social, economic, political and architectural history; (b) stabilize and improve property values in such district; (c) foster civic beauty; (d) strengthen the local economy; (e) promote the use of historic districts for the education, pleasure and welfare of the citizens of the city or town.[30]

These purposes were to be accomplished by authorizing cities and towns to establish historic districts and historic district commissions. Once a district is established "any construction, alteration, repair, moving or demolition affecting the exterior appearance of a structure" requires the approval of the commission.[31] If the commission determines that the destruction or alteration of the structure would be a great loss to the city, town, or nation it must attempt to work out with the owner an economically feasible plan for its preservation.[32] This clause appears to be aimed at the problem of preventing an unconstitutional taking of the property by

over-restrictive regulation. It gives the municipality the flexibility to work out compromises with the landowner. To the extent that it works, it most probably works in favor of the landowner. It is further reinforced by the language in the same section which allows the commission to issue approval if "retention of such structure would cause undue financial hardship to the owner." In addition, the commission can approve an application if its denial would not be in the interest of a majority of the community or if the retention of a structure is a deterrent to a major improvement of substantial benefit to the community. If a historic district commission fails to act within 45 days on an application it shall be deemed approved unless a finding is issued that more time is needed for consideration of the application.[33] As of this writing seven cities and towns in Rhode Island have enacted historic district zoning, and six have been authorized to establish a list of historic structures and to regulate them in the same manner as historic districts.[34]

2. Historical Preservation Commission

Another Rhode Island statute, Chapter 42-45 of the General Laws, established the Historical Preservation Commission in 1968. This act was partly in response to the National Historic Preservation Act of 1966. Through it the state became eligible for the 50 percent matching grants provided by the federal government for survey and planning and for acquisition and development projects for the purposes of historic preservation. The only control over land use was through the federal act, which provides for the advice of the state historical preservation commission to a National Advisory Council, if a project involving federal funding would alter or destroy any site on or eligible for the National Register of Historic Places. This is a rather limited control in terms of land use.

However, in 1974 the General Assembly passed amendments to the Historical Preservation Commission act which give it more control over certain land use decisions. One amendment increased the size of the Commission from thirteen to fifteen and required that other professionals be included on it,[35] but the most important, from a land use control standpoint, is the amendment to Section 42-45-5 (b) of the act, spelling out the powers and duties of the commission. It requires that the state, a city or town, or any subdivision or agency of either cannot fund or license any activity which may alter a site included in the state register of historic places without first getting the advice of the Historical Preservation Commission. The state register would include historical places deemed to be of state importance.

It should be noted at this point that there are over 180 entries from Rhode Island on the National Register of Historic Places.

Entries and nominations for the National Register are presently being incorporated in the Statewide Planning Program's Environmental Inventory. The state register will be activated pursuant to the 1974 amendment to the Historic Preservation Commission Act which provides for limited protection for state historic landmarks. In addition, in the updated state historic preservation plan now being prepared, there is an inventory of over 2,200 historic sites, including entries in the National Register and some sites which would be entered in the future state register. This inventory is being continually expanded as the statewide survey of the Rhode Island Historical Preservation Commission proceeds.

The 1974 amendment to the Historical Preservation Commission Act also states that advisories rendered by the Commission shall be followed unless there are compelling reasons for not doing so, in which case the matter is submitted to the Governor for final determination. The advice of the Commission is therefore more than just advice. It is more in the form of a directive which can only be disobeyed by showing good cause, as determined by the Governor. This amendment then gives the Historical Preservation Commission, an agency of the state, a say in local licensing and funding matters, possibly extending into the realm of zoning and building permits. It is an incursion into local autonomy probably as great as any statewide monitoring of critical areas would be. It is, therefore, an important precedent.

Under the "Antiquities Act" of Rhode Island enacted in 1974 for the identification, interpretation, preservation, and protection of the state's archaeological resources, the Historical Preservation Commission can designate an archaeological site or the site of an underwater historic property as a "State Archaeological Landmark." If the site is privately owned, the written consent of the owner is required for designation. Once a site is so designated, no one may conduct field investigation activities or exploration or recovery activities without first getting a permit from the Commission and complying with the provisions set out in the preceding section of the act. On private property the written consent of the landowner must also be obtained. The act provides for greater protection of historically or archaeologically valuable state-owned property and for control of any activity assisted or licensed by the state. The Historical Preservation Commission can condition the transfer of real property owned by the state or its agencies upon such covenants or deed restrictions as will limit the future use of the property to protect the archaeological or anthropological resources. Failure to obtain a permit required under the act is a misdemeanor.

With respect to historical and archaeological properties as potential critical areas, these existing laws already give the state a limited control over the area. At this point it is only necessary

to make note of the control. Since this control is largely a result of recent amendments, the effectiveness of the control cannot yet be evaluated. A discussion of how this control, like others, can incorporated into a more streamlined and efficient system follows in a later section of this report.

E. WATER SUPPLY AREAS

If the state of Rhode Island has a valid interest in regulating the fresh and salt water wetlands of the state for the general health, welfare, and safety, then surely it has an interest in overseeing the water supply areas in the state which provide drinking water for the inhabitants of the state. It is estimated that slightly more than 95 percent of Rhode Island's population is served by public water facilities.[36] The state therefore has a strong interest in seeing that its water resources are adequately protected and developed. For this reason the legislature, in 1967, formed the Water Resources Board. The act declared that:

> (c) The character and extent of the problems of water resource development, utilization, and control and the widespread and complex interests which they affect demand action by the government of the state of Rhode Island in order to deal with these problems in a manner which adequately protects the general welfare of all the citizens of that state.[37]

Prior to the establishment of the Water Resources Board water supp in the state was strictly a local concern. Local governments made arrangements among themselves for the creation of reservoirs and water supply systems. The cities and towns also formed water supply boards and water departments to deal with water supply. Section 39-15-1 of the Rhode Island General Laws gives any municipality the power to enter into a contract with any person or corporation to supply its water. The town or the person or corporation bound to fulfill such a contract "may take, condemn, hold, use and permanently appropriate any land, water, rights of water and of way, necessary and proper to be used in furnishing or enlarging any such water supply . . . ."

In addition to this in 1945 the General Assembly passed legislation entitled "An Act to Furnish the City of Providence with a Supply of Pure Water."[38] The act authorized the city to acquire by condemnation about 16,000 acres of land on the north branch of the Pawtuxet River to construct a water supply facility. In addition

to the water area of the reservoir itself, land outside of the "flowed area" was condemned:

> for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any of such waters as a potable water supply, and for carrying out the purposes, directions and requirements of this act.

The Providence Water Supply Board currently supplies a number of cities and towns in the Providence metropolitan area with water, and there are plans to expand its service area across Narragansett Bay.

This increased demand for water also prompted the creation of the state Water Resources Board. The Board consists of nine members. Five represent the public and are appointed by the Governor, two of whom are affiliated with public water systems in Rhode Island. The remaining four members are the Director of the Department of Natural Resources, the Director of the Department of Community Affairs, the Director of the Department of Health, and the Chairman of the Joint Committee on Water Resources.[39] The Board has the power to acquire sites, appurtenant marginal lands, dams, waters, water rights, rights-of-way and easements for reservoirs, pipelines, aqueducts, pumping stations, filtration plants and auxiliary structures. It has the power of eminent domain, except that it cannot acquire property used by any municipality for water supply purposes.[40] The Water Resources Board has the power to construct water reservoirs and wells, but it may also lease sites to any municipal agency or special district to construct or administer water supply facilities. Any lease authorized by the Board must be approved by the State Properties Committee.[41]

To date the Water Resources Board has functioned more as a planning and land acquisition agency than as a development agency, and it is currently unresolved whether the development of the proposed Big and Wood Reservoirs will be carried out by the Board or by the Providence Water Supply Board. The other duties of the Water Resources Board include long-range planning for major water supply systems, providing for cooperation between state and municipal agencies and departments; making loans to publicly-owned water supply agencies; and providing for the registration of any person or firm engaged in drilling or constructing wells within the state.[42] In addition, the Water Resources Board must approve plans for the development, extension, or enlargement of a municipal or district water supply system except for the extension of supply mains or pipes within the municipality or district.[43]

The Water Resources Board has a considerable role in the development of new water supply systems within the state, but there is presently no state control over existing water supply systems except for the powers and duties conferred upon the Department of Health under Chapters 46-13 and 46-14 of the General Laws of Rhode Island. These chapters have to do with the contamination of drinking water and the drinking water supply. There is no state control of development of the areas surrounding water supply systems, either ground or surface, other than those immediately adjacent land areas acquired by eminent domain which economics dictate to be the least amount of land area as possible for "protecting and preserving the waters." There is a need for the state to exercise control over development which could potentially damage public water supply systems. Water supply systems epitomize the type of development which has more than local interest. While the methods of cooperation among local governments and of coordination and planning by the Water Resources Board have been sufficient up to this time, the need for comprehensive planning and statewide monitoring of development requires some state control over water resources and related land areas. Reservoirs and aquifers which are currently in rural areas could be under development pressure in the future. The proposals for allowing recreational use of reservoirs could further intensify this pressure for surrounding development. There are currently no municipalities which provide for special zoning around water supply areas, like that permitted around airports. However, the state zoning enabling act provides that a neighboring city or town which has a public or quasi-public water source or a private water source suitable for use as a public water source,

> within one thousand feet of an area that might be affected by any such proposed ordinance or amendment or appeal of any such existing ordinance, or by any proceedings before the zoning board or board of review of any adjoining city or town shall be entitled to due notice of such proceeding and shall be a party in interest in all such proceedings and shall have the same standing and rights of appeal as a landowner, entitled to such notice, who is located in such city or town.[44]

This section shows that the state has recognized the potential regional effects of land use in areas surrounding water supply sources, but this provision is more a negative control than a positive land use planning tool and often would only come into play after significant actions had been taken to change the zoning, adding to the difficulty of successfully challenging the proposed change. This section in the zoning enabling act also reflects the need to control the use of land in an area larger than that which may be acquired by eminent domain. In Rhode Island, the general rule is that 400 feet around any ground water supply will be acquired

for the protection of that supply. This distance varies for surface water, but the point can still be made that the state has already recognized that land use of an area greater than that actually acquired for a water supply should be subject to some control. The only question is what form this control should take.

The control of land use in areas around water supply sources is an especially important issue in Rhode Island. The Rhode Island Water Resources Board has already acquired the land for major water supply systems (the proposed Big River and Wood River Reservoirs), and, as suburban development spreads into existing reservoir areas such as around the Scituate Reservoir and into areas adjacent to ground water supply areas in Washington County, the need for land use control of areas related to water supplies becomes even more critical.

The state needs to exercise control over these areas not to prohibit development but to provide that the necessary studies are done to insure that development does not occur in areas where, for example, soil erosion could occur which would have a detrimental effect upon the water supply. The inclusion of water supply areas in a critical areas control system is therefore a necessity.

F. HIGHWAY INTERCHANGES

In considering critical areas of statewide concern, the highway interchange area is often overlooked. While certainly in a different category than a fragile wetland, the interchange nevertheless has important ramifications in the development and use of land in the area. The term "highway interchange" refers to the controlled access points on any major divided highway. Those highways where access is not limited or controlled present other problems which are better dealt with at the local level; the problems are more of safety and visual quality than of areawide development patterns. The controlled access highway interchange areas are of critical statewide concern because of the state's planning and economic interest in them. It is a policy decision which rests with the state as to where these interchanges will be placed, and it is state and federal funds administered by the state which build these interchanges. There is, therefore, a strong public policy argument for some control over the development of the surrounding area to insure that the state's investment is protected and that the development policy which dictated the placement of the interchange is not undermined by local governmental action or inaction. This need for state control is greatest in new interchange areas in rural areas, since most of the development of a highway interchange area occurs within a few years of the construction of the interchange.[45]

The problems associated with highway interchanges are twofold. The first and most obvious is the safety factor associated with a highway interchange. The interchange area must be designed so that traffic can enter and exit smoothly and safely and also so that drivers are not distracted by buildings and signs too close to the interchange area. The justification for state regulation in this area is, of course, the public safety. The legislative declaration of policy in regulating outdoor advertising stated that:

> In order to prevent unreasonable distraction of operators of motor vehicles, to prevent confusion with respect to compliance with traffic lights, signs, signals and regulations, to promote the safety, convenience and enjoyment of travel upon highways within this state and to protect the public investment therein, to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas, and in the general welfare of the people of this state, the general assembly declares it to be the policy of this state that the erection and maintenance of outdoor advertising in areas adjacent to the rights-of-way of the interstate and primary systems within this state shall be regulated in accordance with the terms of this chapter . . . .[46]

State regulation in this area is, therefore, nothing new or innovative. Laws or regulations to fulfill effectively this legislative purpose would be new, but the justification has already been established.

The second problem associated with highway interchanges is the regulation of development in the area surrounding the interchange. A highway interchange has been called the "front door to the community."[47] Often the local community has zoned all of the land around an interchange as commercial or industrial, resulting in the crowding together of stores, gas stations, motels, and industrial sites around the interchange. This not only causes traffic congestion in the interchange area, with its resultant safety hazards, but it also cuts off access to the interior land and thus actually impedes the development of the region.

Since the problems of interchange areas are twofold, it is not surprising that a twofold approach is needed to their solution. The safety of the interchange should be preserved by strict regulations governing signs, curb cuts, and buildings which could be potential safety hazards. The utilization of the land accessible by the interchange can be accomplished by implementing planning guidelines which allow a variety of uses, such as low-density residential and industrial uses adjacent to the interchange.[48] The state, having the necessary planning skills at its disposal, can

most easily and efficiently develop these guidelines and has the greatest interest in doing so, in order to assure that its highway tax dollars provide benefits to the citizens as a whole. The state has already enacted some legislation dealing, at least implicitly, with highway interchanges. These three acts, all enacted in 1966, were passed in response to federal programs. Probably the most applicable to interchange problems is the act previously cited, dealing with outdoor advertising in areas adjacent to highways. The act states that:

> No outdoor advertising shall be erected or maintained within six hundred sixty feet of the nearest edge of the right-of-way and visible from the main-traveled way of the interstate or primary highways in this state . . . .[49]

However, its effect is severely restricted by the exceptions allowed. The exceptions include: signs advertising the sale or lease of the property upon which they stand; signs advertising activities conducted on the property upon which they are located; signs on areas zoned as industrial or commercial; and signs located on areas not necessarily zoned but used for commercial or industrial purposes.[50] It does not take a legislative analysis to see the limitations which these exceptions impose on the act. In addition, the act provides that the Director of Transportation pay compensation to any person who incurs damages from the taking, by virtue of the act, of any sign or of the right to erect a sign on the property, provided the sign was in existence prior to the act or lawfully erected after the act. Here again, as in the Coastal Wetlands Act, the effectiveness of the act is limited by the lack of funds to pay damages. It is safe to say that few signs have been taken down as a result of this act. This act could be expanded, and the exceptions tightened, so as to prohibit the erection of any structure within 660 feet of any highway, or, at least, of major interchanges; and many of the exceptions, especially those having to do with commercial and industrial zones, could be eliminated. As for the provision for damages, this is needed only for the removal of existing signs. If there are not sufficient funds to pay these damages, the existing signs and structures could be allowed to continue as nonconforming uses and phased out or paid for when the funds were available. In short, the act could be considerably expanded without infringing upon basic constitutional rights. The restrictions which the 660 foot clause would impose could only be deemed to be an unconstitutional taking if they left the owner with no reasonable use of his land. There are, conceivably, situations where this might occur. To avoid such a situation a clause would be inserted in the act, like the amended section 2-1-21 (b) of the Fresh Water Wetlands Act, whereby the Director of Transportation could decline to pay compensation, and the landowner could develop as he originally intended. Perhaps even better would be a clause allowing the Director of Transportation and the landowner to reach a compromise agreement if the enforcement of the act would appear to deprive the

landowner of all reasonable use of his property.

An act related in scope and intent to the Outdoor Advertising Act is the Junkyard Control Act, also passed in 1966. It was enacted to promote the "public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways, and to preserve and enhance the scenic beauty of lands bordering public highway . . . ."[51] Under this act it is unlawful to establish, operate or maintain a junkyard within one thousand feet of the nearest edge of the right-of-way of any interstate or primary system. Like the Outdoor Advertising Act, the Junkyard Act has important exceptions. A junkyard is excepted if it is screened in such a way as not to be visible from the highway; if it is located in an area zoned for industrial use or an area used for industry; or if it is not visible from the highway. If the junkyard is lawfully in existence, the Director of Transportation has the authority to screen it on the highway right-of-way or areas acquired for that purpose. If the screening of the junkyard is not feasible, the Director can acquire the land the junkyard is on. A violation of the act is a misdemeanor. Apparently, a few junkyards have been screened under the act.[52] However, other than allowing the Director of Transportation to screen the junkyards, the act cannot be very effective because of the exception of industrially zoned or used property. Most junkyards are built on such property; some municipalities, like Providence, only allow junkyards in industrial zones. While the problem of junkyards in interchange areas is not one of great magnitude, the Junkyard Act does illustrate how a land use control act can be drawn to be virtually useless for the purpose for which it is intended.

The last act related to land use control around highways is entitled "Scenic Enhancement and Facilities, Federal-Aid Highways." The act gives the Director of Transportation the power to acquire land, by eminent domain if necessary, for the preservation of scenic beauty and the establishment of safety rest areas along federally-aided highways. Under this program, ten sites have been acquired, and one highway has been landscaped.[53] The act has very little relation to the problems associated with highway interchanges. As was previously stated, the problems involving interchanges are two-fold: that involving the safety of the interchange; and that prolem involving the regulation of development to maximize the usefulness of the interchange. Both of these are issues in which the state has a valid interest. In fact, there is considerable overlap with these two problems. An interchange which makes the most efficient use of the land would also tend to be the safest. The state has an interest not only in providing for the safety of its citizens, but also in getting efficiency from its highway investment. Unplanned highway interchange areas, very often, are not only ugly, but they

are also an inefficient use of land. If the state has the authority to determine the highway location, it has a duty to see that its purposes are not subverted by inefficient and ineffective local controls. The way to institute control is to strengthen state laws designed to promote highway safety, such as the Outdoor Advertising Act, and by drawing up state guidelines for local control of interchange area planning. This would insure the uniformity of regulations needed for the efficient and safe use of the highway, but it would still allow for some deviation where local characteristics require it. The mechanism for state and local interaction will be discussed in a later section of this report.

G. AIRPORTS

The statewide transportation implications of highway interchanges are present to an even greater degree in the considerations of airport siting and zoning. Airports, especially T.F. Green Airport in Warwick and the four other state-owned airports in Rhode Island, benefit and are used by the citizens of the entire state. Their development, and the development of adjacent areas, while certainly affecting the local area, also has an impact upon the entire region in terms of economics, population density, and the volume of traffic present. Typically the agency which operates the airport (in Rhode Island, the Airports Division of the Department of Transportation, pursuant to Sec. 42-13-2 (f) of the General Laws) has no jurisdiction over land use planning and controls outside the boundary of the airport. Moreover, "an airport, beyond the benefits it brings to the community as a transportation facility and a local industry, also becomes a significant factor in the determination of real estate values in adjacent areas."[54] The effects of an airport clearly extend beyond its boundaries, or even beyond the land immediately adjacent to it. The preliminary draft of the State Airport System Plan proposed that the Department of Transportation, in conjunction with the communities concerned, develop an Airport Environs Plan which would deal with, among other things, the feasibility of acquiring property or noise easement rights in areas affected by intolerable or unacceptable noise; and the establishment of zoning, building codes, and other land use controls to prevent any increase in residential population or other noise-sensitive land uses within areas which are severely affected by noise.[55] These proposals deal with the relationship between the airport and the community in which it is located. This relationship was recognized by the General Assembly in 1946 in the creation of the "airport zoning act."[56] This legislation was enacted mainly to deal with the hazards involved with airports. It authorized the Division of Aeronautics, now the Airports Division of the Department of Transportation, to formulate approach plans for airports, and it gave to

"every political subdivision having an airport hazard area wholly or partly within its territorial limits" power to enact airport zoning regulations for"airport hazard areas" specifying the land uses permitted and regulating the height to which structures and trees may be erected or allowed to grow.[57] If the airport is located in more than one political subdivision, or if the airport hazard area is, then joint zoning boards may be created by the political subdivisions involved.[58] The act does not require airport zoning but only gives local governments the power to zone for airport hazard areas if they so desire. Currently, only two Rhode Island communities have used the airport zoning enabling act. There are no state standards and no state review of local airport regulations, and applications and appeals are processed through local agencies(administrative agencies and boards of appeals), except that there is a right to judicial review in the Superior Court under Section 1-3-27

The scope of this act is therefore extremely limited in terms of the regulation of a critical area. It recognizes the relationshi between the airport and the local community only in terms of safety hazards; and if an adjoining community is outside the airport hazard area, it has no control whatsoever over planning and development. Moreover, there is no real continuing cooperation between the airports division and the local community. As pointed out in a report by the Planning Department of the City of Warwick, home of T. F. Green State Airport: "the land use control provision (of the airport zoning act) is no different than the general zoning section in that the City has a right to zone for compatible uses. Therefore, in the absence of any specific land use control technique for airports the City can only impose height restrictions. Simply zoning for non-residential uses around the airport has not succeeded becaus the airport's expansion has now reached a point where residential zones are now abutting the airport boundary."[59] Warwick also notes that its airport zoning becomes even more ineffective when it is unable to have any input into the airport planning process.

There is, then, the need for more efficient and responsive airport planning, for an airport and its environs. This planning must balance the needs of the state with those of the surrounding communi or communities. Clearly, the local government acting alone cannot accomplish this, nor can a state agency. Each has it own priorities which are often at odds with the others'. What is needed here, as in the highway interchange area, is a two-tiered system which sets minimum standards to accomplish state purposes, but which also allows for local input in order to adopt any plan to the local community's needs. The purpose of such a system is, of course, to provide for the public health, safety, and welfare. The problems involved with height restrictions; noise and air pollution control; providing for compatible land uses; and providing for thoughtful and effective air facility planning are problems which neither the

state nor the local government can deal with alone. Again, a two-tiered planning system which incorporates the objectives of both the state and the local government is the answer.

H. PUBLIC TRANSPORTATION FACILITIES

The public transit element of the State Guide Plan was adopted by the State Planning Council in 1969.[60] The plan recommended the construction of new public transportation facilities; improvements to the existing service provided by the bus transit and commuter rail transit systems; and the acquisition of privately-owned transit companies to insure that their service is not lost. According to the plan, the major obstacle to the development of the public transit system is the difficulty in attracting passengers. The automobile is currently, and will probably continue to be, the principal mode of transportation for most Rhode Islanders. The spread of population to the outlying suburbs in a low-density development pattern makes the automobile the most convenient, and the cheapest, method of transportation at this point. However, expected energy shortages or, at least, the increased cost of fuel, along with the environmental problem attendant with extensive use of automobiles, makes increased public transportation a near-necessity.

The General Assembly recognized this need for public transportation when it enacted, in 1964, the Rhode Island Public Transit Authority Act.[61] The Transit Authority was empowered to acquire all or part of any mass motor bus passenger transportation system which has filed a petition with the public utilities administrator to discontinue service, if the Transit Authority determines that it is in the public interest to continue the service.[62] The Authority has the power to "acquire, purchase, hold, use and dispose of any property" as well as lease or mortgage any property necessary to carry out the purposes of the act.[63] The Authority also has eminent domain power. In addition to the land use powers of the Transit Authority, which are minimal, the Department of Transportation, as a result of the 1970 reorganization, has the power to"plan, construct and maintain" commuter parking facilities so as to encourage the use of mass transportation and reduce peak traffic demands on highway systems.[64] The director of the Department has the authority to acquire land for these purposes. The condemnation of land can be used if necessary.

In 1970 the Department of Transportation was established to carry out the duties of the former Department of Public Works, the Registry of Motor Vechicles, the Rhode Island Turnpike and Bridge Authority, and the Council on Highway Safety. The Department of

Transportation is also responsible for maintaining an adequate level of rail passenger and freight services, and for the preparation of short range plans, project plans, and implementation programs for transportation.[65] The Public Works Division of the Department of Transportation is "responsible for the design and engineering of roads, bridges, transit facilities, airport facilities, . . . and all other transportation facilities." The Planning Division assists in preparing the transportation elements of the State Guide Plan and prepares functional and area plans, project plans, improvement programs, and implementation programs consistent with the State Guide Plan. The Planning Division also does corridor, route location, feasibility, facility needs, and other studies as they are needed.[66]

A 1969 amendment to Section 39-6-31 of the General Laws declared that "the preservation of open spaces and the orderly control and development of unused or undeveloped land bears a substantial relationship to the public health, safety and welfare of the people of this state." To this end the amendment allowed for the acquisition, by any department, board, bureau, commission, or agency of the state government of any railroad right-of-way which has ceased to be used by the railroad. This acquired land may be used for another transportation facility or for a public conservation or recreation area.

This brief discussion covers state control over land use as it relates to public transportation facilities. These laws, of course, relate only to the actual land occupied by the facility.

There is no control over the use of land in areas adjacent to the facility. Consideration should be given to including some such land in a regulatory system for areas of statewide importance.

A typical public transit facility has its terminal point in a highly developed industrial or commercial area. Its route usually follows the path of expanding development from this central core, with residential uses predominant in the outermost limits of the transit line. Another type of public transportation line has its two end points in urban areas with residential areas in between. To a certain extent, development follows the route of the transit line, and to a certain extent the reverse is true.

In either case, it is important for the state to insure that local control over land use does not act to the detriment of the public transportation facility. By enacting low-density zoning, a community could make public transportation economically unfeasible. For example, in Warwick there are two proposed sites for commuter rail stations. The maximum net residential density now permitted by the city zoning ordinance is six dwelling units per acre for single family dwellings. The density needed to support a rail transit system is estimated at 25 to 50 dwelling units per acre, gross density.[67] At the other end of the line, a mass transit station, to be

most efficient, should be located in a central commercial or industrial area so that those using the facility will arrive close to their place of work. A city should maximize this efficiency by encouraging land uses near the transit facility which are concentrated sources of employment.

On first view, this type of state control may seem to be an overextension by the state into the jurisdiction of local governments. Certainly the public safety arguments invoked in state control over areas adjacent to airports and highway interchanges cannot be made for public transit facilities. However, it should be pointed out that the control proposed could be flexible and closely related to the need for control. In this situation, the need is to insure that the land use objectives of the local government are not contradictory to planning objectives of the state for transportation. The needs of both should be considered, and the "control" should involve input from both levels of government. The controls proposed could only require that local planning boards develop their plans with a view to the public transportation needs of the entire state when such facilities are located within their jurisdiction. There is no proposed restriction of development such as in a wetland area. The required restrictions would be no more than those which the local government already has the power to enforce. It would only seek to coordinate the local and state governments in working together for the general welfare of the citizens of the locality and the citizens of the state to the extent that the citizens of the state are affected by local land use decisions.

I. PUBLIC UTILITIES

One of the most obvious activities which has a more than local impact is the operation of public utilities. A public utility, as it is defined by Section 39-1-2 of the General Laws of Rhode Island, means every company doing business in this state as a railroad, street railway, common carrier, gas, electric, water, telephone, telegraph and pipeline company. The services which these companies furnish are vital to the public interest and certainly extend beyond the locality in which the utility has its main terminal or power generating plant.

It is for these reasons that the General Assembly created the Public Utilities Commission. The legislature found that the regulation of these businesses by the state is necessary "to protect and promote the convenience, health, comfort, safety, accommodation and welfare of the people, and (is) a proper exercise of the police power of the state."[68] The Commission has the power to regulate public utilities to increase and maintain their efficiency and to

provide safeguards to the public against improper and unreasonable rates, tolls, and charges. The most important power of the Public Utilities Commission, from a land use control viewpoint, is its power to override local zoning decisions. Section 39-1-30 of the General Laws of Rhode Island provides that:

> Every ruling, decision and order of a zoning board of review and of a building, gas, water, health or electrical inspector of any municipality affecting the placing, erection and maintenance of any plant, building, wires, conductors, fixtures, structures, equipment or apparatus of any company under the supervision of the commission shall be subject to the right of appeal by any aggrieved party to the commission within 10 days from the giving of notice of such ruling decision or order. The commission after the hearing, . . . , shall as speedily as possible determine the matter in question weighing the consideration of public convenience, necessity and safety against considerations of public zoning, and shall have jurisdiction to affirm or revoke or modify such ruling, decision or order to make any order in substitution thereof. Every ordinance enacted or regulation promulgated by any town or city affecting the mode or manner of operation or the placing or maintenance of the plant and equipment of any company under supervision of the commission shall be subject to the right of appeal within 10 days of enactment.

This section insures that a local government, acting in its own self interest, cannot unreasonably prohibit the operation or construction of a public utility. The section states that the Commission should weigh the "consideration of public convenience, necessity and safety against consideration of public zoning." This calls for a balancing test to be made by the Commission, but it mentions only the factors to be considered on the side of the public utility (public convenience, necessity and safety), and not the possible overriding factors to be considered on the side of local zoning. The Commission also has the power to authorize public utilities to use the power of eminent domain to acquire property if it is for the benefit of the people of the state.

The Public Utilities Commission therefore has considerable power to regulate land use as it relates to public utilities. The Commission, along with the Coastal Resources Management Council, are the principal state agencies involved in the location and operation of power generating plants. Considerably less authority is allocated to the Rhode Island Solid Waste Management Corporation, which has neither the power to override local zoning nor the power of eminent domain.[69] The Rhode Island Port Authority and Economic Development Corporation has the power of eminent domain but can disregard local zoning ordinances only if the project is situated on federal land.[70] Of course, the Public Utilities Commission is a

state agency, while the Solid Waste Management Corporation and the Economic Development Corporation are quasi-public corporations set up by the state. Also, while solid waste disposal and economic development are important public purposes, it can be argued more irrefutably that public utilities are absolutely essential to the citizens of the state as a whole and should not be subject to land use control at the local level only.

A major complaint leveled against the Public Utilities Commission is that it too readily takes the side of the utility company against the public. This problem arises partly because of the dual purpose of the Commission, to increase and maintain the efficiency of the company while protecting the public against unreasonable rates. This problem could be partly solved by allowing an independent land use body to coordinate the statewide interest in public utilities with the local government. This would eliminate one area in which the Public Utilities Commission often has to side with the utility companies against the public. It would also allow for a more balanced determination of the aims and needs of the local government and those of the utility company. If the view of legal scholar Joseph Sax and others that regulatory agencies often assume the outlook of the industry which they regulate is valid,[71] then the Utilities Commission should not decide land use issues between the industry it regulates and a political subdivision. The zoning board can appeal to the Supreme Court of Rhode Island,[72] but the Supreme Court must grant certiorari, so the absolute right to judicial review is not present.

It is generally agreed that land use decisions regarding public utilities are a matter of state concern. What is questioned is the agency which should make the ultimate determination of the use of land. Recognition of the need for statewide control of critical areas is recognition of the pressure which conflicting interests place on the use of land. The final balancing of these interests must be done through a system which views the efficient and equitable use of the land of the state as the ultimate interest to be served.

J. LARGE-SCALE DEVELOPMENT

A final type of critical area is the large-scale development. Large-scale development is generally defined as private development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance.[73] Within this category might be included some industrial sites, shopping centers, and large residential developments.

The impact which these developments have on the surrounding environment is determined largely by the type of development. Industrial sites may have impact in terms of air, noise, or visual pollution; traffic congestion; and the need for housing and commercial areas in the surrounding area for the people employed at these sites Shopping centers have impact mainly in terms of traffic congestion and mobile-source air pollution but can also be an impetus behind residential and commercial development in surrounding areas. Finall large residential areas have impact in terms of the need for service not only those provided by the community such as water and sewer, but also for the private services needed by any large concentration of people. Large residential developments also increase traffic congestion and may stimulate other residential, commercial, and industrial development. Obviously, these three types of development are interrelated. Industrial development can spur residential and commercial development; residential development can spur commercial and sometimes industrial development; and, finally, commercial development, in the form of shopping centers, is both the result and the cause of other types of development. It is therefore easy to see how industrial, commercial, or residential development at a larg scale can have an impact on the environment greater than the local jurisdiction in which it is located. This is especially true if the development in question falls near the boundaries of the local jurisdiction.

The problems posed by this type of critical area, development of more than local impact, are quite different from those presented by unique or significant environmental areas, or even those presente by the location of public utility or water supply areas. The first problem is that the regional-impact areas cannot be mapped or regulated prior to proposed development, as a wetland or a historic site can be. This means that regulations must be drawn as comprehensively and succinctly as possible, in order to give notice to prospective developers that their projects might fall within this classification of large-scale development. A process should also be established for a binding determination of whether a borderline development is subject to the regulations.

A second problem is that of justification. Unlike environmental protection or provision of public services to the citizens of the state, there may appear to be no traditional police power justification. The impact of development, while certainly beyond local limits, is finite in nature, and this impact will rarely be felt throughout the whole state. The state's intervention is therefore best justified not for protection of public health, safety, or welfare, but for assessment of the regional impact of land use. This is a coordinating role which would perhaps be best suited to a regional governmental body, but, in the absence of a comprehensive regional governmental system in Rhode Island and considering the state's small size, it would appear that this role can best be filled by the state. Naturally, in any regulatory system devised for this purpose, there should be provision for input by local governments affected by this type of development.

Having identified types of large-scale developments and some of the problems involved in their regulation, it is now necessary to examine existing state laws governing these areas. With the possible exceptions of the Department of Economic Development, the Department of Health (for air and water pollution control), and the Coastal Resources Management Council (over specified uses and areas), there is no state control over these areas. The state legislation relating to large-scale development consists mainly of enabling acts allowing local governments to enact zoning and subdivision regulations.

The Rhode Island zoning enabling legislation is a standard zoning enabling act. Its purpose is "promoting the public health, safety, morals, or general welfare,"[74] and it gives a city or town council the power to:

> regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, and to prohibit or limit uses of land in areas deemed to be subject to seasonal or periodic flooding.[75]

Among the stated purposes of the ordinance are to "prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements."[76] The act provides for hearings for general and specific ordinances prior to enactment.

In addition, the act provides that:

> The city or town council of any city or town, the boundary of which is within an area that might be affected by any such proposed ordinance or amendment or appeal of any such existing ordinance, or by any proceeding before the zoning board or board of review of any adjoining city or town where a landowner in such area would be entitled to notice of such proposed change or proceeding except that such area is beyond the boundary of the particular city or town, shall be entitled to such notice and shall have the same standing and rights of appeal as a landowner, entitled to such notice, who is located in such city or town.[77]

The section does not specifically define what constitutes "an area that might be affected by any such proposed ordinance." Presumably, it would be the same as for the section providing that any landowner is entitled to notice of specific changes in the zoning map (under section 45-24-4.1 of the General Laws), if his property is within 200 feet of the perimeter of the real property which is the subject matter of the proposed amendment. This is a very limited area. However, if a public water supply or a water supply capable of being used for public purposes is involved, then the adjacent area is extended to 1,000 feet; and the city or town council of this adjoining area has the same standing and rights of appeal as a landowner.[78] This appeal provision for adjoining cities and towns, while it recognizes the adverse effect which zoning may have on neighboring communities, is more of a negative power to oppose regulations than a positive input into the formulation of controls, as it should be. The statute goes on to provide for selection of a board of review by the city or town council with the power to make special exceptions to the zoning ordinance, as well as the power to hear appeals. It does not give guidelines for the granting of special exceptions. There is also a provision for appeal to the Superior Court.

Local control over the subdivision of land was conferred upon local governments by Chapter 45-23 of the General Laws. This act defines subdivision as the "division of a lot, tract or parcel of land into two or more lots, sites or other divisions of land in such a manner as to require provisions for a street, for the purpose, . . . of sale or building development." [79] The act gives the city or town council the power to authorize the plan commission (the official planning agency of the city or town) "to adopt, modify and amend rules and regulations governing and restricting the plotting or other subdivision of land in such city or town, and to control the subdivision of land pursuant to such rules and regulations." [80] The act enables the plan commission to develop rules and regulations as to physical requirements for subdivisions, and no plat is considered approved until it is accepted by the plan commission. An approval of the plat is deemed an acceptance of any dedicated areas within

the plat. It should be noted that a fairly recent Rhode Island Supreme Court decision has held that while the regulations formulated by a plan commission may require a subdivider to donate a portion of the subdivided land for recreational purposes, they cannot require a minimum percentage of that land to be donated for this purpose.[81] This case appears to restrict the power of the plan commission to regulate subdivision for the "general health, safety, morals or general welfare," in that restrictions for nonessential general welfare purposes, while permitted, cannot be clearly defined. This is an area of the law which should be clarified by amendment. The act provides that the zoning board of review may also be the board of review for subdivision regulations, and there is also judicial review in the Superior Court.

Under Chapter 45-35 of the General Laws, a city or town has the authority to establish a conservation commission which may acquire open space (not by eminent domain, however). Under Chapter 45-36 of the General Laws, a city or town may acquire open space without setting up a conservation commission, but, again, there is no eminent domain power.

While the state can currently exercise little direct authority over commercial and residential development (other than through coastal resources or pollution control regulations), its jurisdiction over industrial development through public and quasi-public agencies is substantial. In 1958 the General Assembly established the Industrial Building Authority under Chapter 42-34 of the General Laws to encourage industrial growth in the state. The authority guarantees loans to non-profit industrial development concerns.

In addition, in 1965 a Recreational Building Authority was established under Chapter 42-38 of the General Laws which has basically the same powers but with relation to recreational facilities. Both of these programs, while having no real land use control, can provide incentives to economic development in certain areas, and can aid in the creation of open space or recreational areas by entering into agreements with prospective developers.

Both the Recreational Building Authority and the Industrial Building Authority are now associated with the state Department of Economic Development, formed in 1974 by the addition of Chapter 60 to Title 42 of the General Laws. Under Section 42-60-2 (b), the department provides administrative services for these two authorities.

The Department of Economic Development also performs administrative functions for the Rhode Island Industrial Facilities Corporation and the Howard Development Corporation. The Rhode Island Industrial Facilities Corporation was formed to acquire, construct, finance, and lease industrial facilities projects in the state.[82] It is a

quasi-public agency with no land-use power other than that of encouraging development. In 1972 the General Assembly formed the Howard Development Corporation[83] to develop surplus state land at Howard institutional complex in Cranston. The corporation was given title to this complex and also was authorized to acquire, improve, finance, convey, and lease land. In 1969 the Rhode Island Development Council (the predecessor agency to the Department of Economic Development) set up the Narragansett Industrial Development Corporation. It was set up to acquire and develop the Narragansett Oceanographic Industrial Park land for industrial use. It is also now associated with the state Department of Economic Development.

When the General Assembly established the state Department of Economic Development in 1974 it also created the Rhode Island Port Authority and Economic Development Corporation.[84] The Corporation was formed to deal with the problems of unemployment and underemployment and the problems created by the "drastic curtailment of federal military installations" in Rhode Island. The act goes on to state that:

> (d) It is further found and declared that the acquisition and development of property for industrial, manufacturing, recreational and commercial purposes (including the property to be disposed of by the United States government and that land reverting to the state pursuant to the provisions of public laws 1939, Chapter 696) and the disposition thereof, must be undertaken on a comprehensive statewide basis so as to assure that new industrial, manufacturing, recreational and commercial sites are adequately served by appropriate transportation facilities and public services and that such sites are located in such manner as to provide for the orderly economic growth and development of the state, while at the same time conserving the environment. Local planning and development agencies and institutions are insufficient to provide for such comprehensive statewide planning and development.[85]

Were it in a regulatory act, this subsection could be the justification for control of large-scale industrial and commercial development as a critical area of statewide importance. The act gives the Economic Development Corporation the power to plan and assist in the development of commercial or industrial sites, and, moreover, the power of eminent domain to acquire land for such purposes. More importantly for the purposes of this report, Section 42-51-13 gives the Corporation the power to plan, construct, reconstruct, rehabilitate, alter, improve, develop, maintain, and operate projects on federal land regardless of local zoning or other land use regulations. This relates only to projects on federal land and still allows for some local input. Any projects, however, must conform to the State Guide Plan and to the provisions of the Coastal Resources Management Act.

The main impetus behind the formation of the Port Authority and Economic Development Corporation was the closing of naval facilities in Rhode Island and the desire to use this land for the economic benefit of the state. The scope of the act is, however, much broader than this, and it provides a basis for the justification of state intervention in the regulation of commercial and industrial development. It is not proposed here that the state or a quasi-public agency set up by the state be permitted to override all local zoning ordinances. Rather, it is hoped that a balance between state and local control can be reached, recognizing the need for local autonomy but at the same time providing for situations where state interest justifies a state role.

These various state acts relating to economic development, both industrial and commercial, evince a strong state interest in large-scale development. This interest, combined with the interrelatedness previously shown to exist among large-scale industrial, commercial, and residential development, suggest the inclusion of these uses as critical areas of statewide concern. Not only surplus military land but other development of regional impact should be included as areas of state interest.

It should be mentioned that the state already exercises other types of control over development of regional impact, although usually under single-purpose statutes. For example, development which affects air or water quality, whether local or regional, is controlled through air and water pollution regulations. Included among air pollution controls are "complex source" regulations which relate to mobile source (vehicle) emissions associated with new stationary sources such as sports stadiums or large shopping centers. Complex source regulations therefore represent a form of control over regional-scale projects. Proposed "air quality maintenance plan" regulations would also involve developments of regional impact. These environmental regulations, however, consider only a single type of regional effect.

In addition, the state's Coastal Resources Management Council Act, described in a previous section, already establishes state-level control over other types of development of regional impact. This statute provides a broad basis for considering impacts ("situations in which there is a reasonable probability of conflict with a plan or program for resources management or damage to the coastal environment"[86]) but limits the jurisdiction of the Council to specified land uses and activities. The coastal act recognizes the need to provide for a state role in controlling development of regional impact, but it is limited to certain kinds of development which have an impact on coastal resources.

Thus, a number of existing state laws and programs reflect a concern for large-scale development or development of regional impact. In each instance, however, the concern is limited to "operating" or "program" rather than to regulatory authority, to a single type of impact, or to a narrow category of developments.

PART THREE: ANALYSIS OF OTHER CRITICAL AREAS PROGRAMS

Before drafting critical areas legislation for Rhode Island it is appropriate to examine other such programs: laws proposed by other states and the federal government, whether enacted or not, as well as the American Law Institute's draft Model Land Development Code.

This section considers the critical areas provisions of three federal land use bills: (1) the Land Use Policy and Planning Assistance Act of 1972, which passed the Senate but was defeated in the House; (2) the Land Use Planning Act of 1974 (HR 10294, the "Udall bill"); and (3) a proposed substitute for HR 10294, HR 1135, which was defeated. Also analyzed are the critical areas provisions of the Model Land Development Code (third draft), and of fifteen states (as of 1974):

the Arkansas Environmental Quality Act of 1973, status unknown;

the California Environmental Land Management Act, still under consideration;

Colorado's HB 1041, passed as Section 1-106-7 of the Colorado Revised Statutes, 1963;

the Florida Environmental Land & Water Management Act of 1972, passed;

Idaho's SB 1376 and SB 1377, both defeated;

Iowa's HF 1422, defeated;

the Maine Act for a State Register of Critical Areas, passed;

the Maryland state planning act, passed;

the Michigan State Land Use Act, sent to the House Appropriations Committee (for all practical purposes, defeated);

the Minnesota Critical Areas Act of 1973, passed;

the New York Land Use & Development Planning Law, whose provisions seem to have been incorporated in other legislation

Oregon's SB 100, passed;

the Utah Land Use Act, passed by the legislature and awaiting a November referendum;

the Washington Land Use Planning Act of 1973, defeated; and

Wisconsin's AB 882, as revised, which did not pass.

This material was gathered during the summer of 1974; since that time other critical areas bills have been proposed or adopted.

In all cases the actual text of the law, proposed or enacted, was the basis for study. Some states and the federal government sent additional information. Other sources consulted were the report on critical areas prepared for the Council of State Governments; the weekly newsletter Land Use Planning Reports; and The Quiet Revolution in Land Use Control, published by the Council on Environmental Quality (see Bibliography for complete listing).

The provisions of each bill are summarized on the accompanying tables under the following categories:

(A) Agency Structure: the name and structure of the agency or agencies authorized to implement the bill.

(B) State-Local Relationship: a brief description giving an overall view of the information presented in categories E-H.

(C) Types of Critical Areas: types of geographical areas in need of special protection which the state or local governments are authorized to provide.

(D) Types of Activities of More Than Local Impact: types of developments and activities requiring special regulation which the state or local governments are authorized to provid

(E) Designating Critical Areas: the process by which areas may be identified as needing special protection.

(F) Designating Activities of More Than Local Impact: the process by which developments and activities may be identified as requiring special regulation.

(G) Regulating Critical Areas: the process by which special protection for critical areas is provided.

(H) Regulating Activities of More Than Local Impact: the process by which special regulation for developments and activities of more than local impact is provided.

(I) Relationship to Other Land Use Controls: whether the critical areas provisions are part of a broad land use planning act or comprise a separate law; what related laws exist if information is available.

(J) Constitutional Issue: whether there is any explicit provision to prohibit taking private property for public use without due compensation.

(K) Experience Or Analysis: status or history of the legislation and comments on it if such information is available.

To avoid constant repetition of an explanatory phrase such as "would require if it had been passed," defeated bills are discussed in the same manner as laws actually in effect.

A. AGENCY STRUCTURE

Any state regulation of matters of statewide importance requires an agency to perform it. A variety of agency structures are suggested in the critical areas programs studied (see Table 1).

The Model Land Development Code calls for the establishment of a state land planning agency in the Governor's office. In larger states this would place a great deal of land, some of it a considerable distance from the capital, under the agency's control. The state land planning agency is therefore permitted to devide itself into regional planning divisions. These regional divisions, sections of the state planning agency created to focus on a particular part of the state, are not to be confused with the regional planning agencies which in many states function above the local but below the state level. Neither type would be appropriate in a state as small as Rhode Island. The Governor may also appoint state and regional advisory commissions, which may be made up of professionals, private citizens, or officials of other state agencies or local governments.

This is the pattern adopted by six states: Florida, Maine, Maryland, New York, Washington, and Wisconsin. Florida calls its state advisory commission the Environmental Land Management Study Committee, representing various land use interests. In Maryland, the advisory board is called the State Planning Commission. It is composed of seven members representing different geographic, economic, and social interests, and is part of the Department of State Planning. Wisconsin's advisory group is the Land Resource Council, composed of the chairman of each regional planning commission plus thirteen citizens including six elected local government officials. Washington and New York do not have advisory commissions.

In another common pattern the state planning agency has no regulatory functions. Instead, a special commission, much like the advisory commission of the other pattern, makes the decisions, presumably making use of information supplied by the state planning agency. This is the pattern of Arkansas, California, Colorado, Iowa, and Utah. In California, the State Land Use Commission is composed of nine informed members, and the planning agency is the Department of Land Use Management in the Resources Agency. In Colorado, the State Land Use Commission is assisted by the State Planning Agency, in turn assisted by the Department of Local Affairs, the Oil & Gas Conservation Commission, the Soil Conservation Board and Soil Conservation Board and Soil Conservation Districts, the State Forest Service, the State Geological Survey, the Water Conservation Board, the Historical Society, the Department of Natural Resources, and the Division of Mines.

Table 1

AGENCY STRUCTURE

ALI Model Code, Tentative Draft #3	State Land Planning Agency: created in Governor's Office(8-101). Regional Planning Divisions: may be created by state agency and assigned its functions (8-102). State and regional advisory commissions: may be appointed by Governor (8-103). Local land development agencies: appointed by either state or local governments (8-205). Land Development Adjudicatory Board: chosen by Governor or highest state court (7-707).
Federal Land Use Policy and Planning Assistance Act of 1972 (S. 632)	Office of Land Use Policy Administration: established in Department of Interior (201a); Director appointed by President with advice and consent of Senate (201b). National Advisory Board on Land Use Policy: consists of Director of Office, representatives of Departments of Agriculture, Commerce, HEW, HUD, and Transportation, Atomic Energy Commission, EPA, other agencies. Observers from Council of Environmental Quality, Federal Power Commission, and Office of Management and Budget (203b). Advisory members representing local and state governments and regional planning agencies (203e). Structure of state agencies not specified, but must have advisory council of chief elected officials of local governments (302.b7).
Federal Land Use Planning Act of 1974 (H.R. 10294)	Interagency Land Use Policy and Planning Board established; chairman appointed by Secretary of Interior; representatives of Departments of Agriculture, Commerce, Defense, HEW, HUD, Transportation, Treasury, Atomic Energy Commission, Federal Power Commission, EPA, Council on Environmental Quality, General Services Administration; other federal agencies where appropriate; representatives of state and local governments and regional intra-and interstate public planning agencies (401). Structure of acceptable state agency not specified, but must have intergovernmental advisory board composed of elected officials of local government (103c).
Proposed Substitute for H.R. 10294(H.R.1135)	Office of Land Use Planning: established in Department of Interior, director appointed by President with advice and consent of Senate (301b). Shall consult with other federal officials to coordinate programs; shall consult with and consider views of representatives of Departments of Agriculture, Commerce, Defense, HEW, HUD, Transportation, and Treasury, Atomic Energy Commission, EPA, Federal Power Commission, Council of Environmental Quality, Executive Director of Water Resources Council (301c7). Structure of acceptable state agency not specified, but must have intergovernmental advisory council composed of elected officials of local government (103c).
Arkansas	Environmental Preservation Commission: 9 members appointed by Governor and confirmed by Senate from persons with an interest in preservation of natural environment (4 & 5), 3 representatives and 3 Senators as official advisors (8).
California	State Land Use Commission: 9 members with knowledge of land economics and development, environmental sciences, local and regional government, resource planning; representing state at large (64910). Department of Land Use Management: in Resources Agency (64935).
Colorado	Land Use Commission, Department of Local Affairs, Oil and Gas Conservation Commission, Soil Conservation Board and Districts, State Forest Service, Geological Survey, Water Conservation Board, Historical Society, Department of Natural Resources, Division of Mines.
Florida	State and regional planning agencies; Land and Water Adjudicatory Commission/Administration Commission: consists of Governor and cabinet (3.1); Environmental Land Management Study Committee: created by act, consists of 15 members representing environmental interests, organized labor, business interests, home construction industry, academic community, land sales industry, real estate profession, agriculture interests, etc. (9.1).
Idaho	State Planning and Community Affairs Agency; Local Government Approval Commission: convened by state agency to consider development of regional impact; composed of chairman of board of county commissioners or delegate from each affected county, mayor or city councilman from each affected city; 1 member representing each affected school and highway district (67-1935).
Iowa	Department of Soil Conservation and Land Use: created by act (3) and State Soil Conservation Committee; State Land Use Policy Commission: created by act, consists of 8 members of Soil Conservation Committee, 5 members representing different-sized cities, and advised by various state land use agencies (4); Intergovernmental Advisory Board: 11 members representing local governments (10); County Land Use Policy Commissions: established by act (16).
Maine	State Planning Office; Critical Areas Advisory Board: created by act; appointed by Governor; consists of director of State Planning Office and 10 members serving 3-year terms (3313).
Maryland	Department of State Planning: created by act (first passed 1959) and responsible to Governor (1); includes State Planning Commission (advisory board): 9 members, 7 selected by Governor to represent different broad geographic, economic, and social interests in state, 1 senator, 1 representative (4).
Michigan	State Land Use Commission: created in Department of Natural Resources (21.1), 7 members representing different parts of state (21.2); has advisory council in Department of Natural Resources (24.1): 40 members representing different interest groups (24.2).
Minnesota	Environmental Quality Council, regional development commissions.
New York	State Office of Planning Coordination; regional planning agencies; intermunicipal agencies; local planning and development agencies; review agencies: county or regional planning agencies or State Office of Planning Coordination.
Oregon	Department of Land Conservation and Development, created by act, contains Land Conservation and Development Commission: 7 members representing different geographical areas (4 & 5); Joint Legislative Committee on Land Use (25); State Citizen Involvement Advisory Committee: appointed by Commission and representatives of geographic areas of state and interests relating to land use (35.1); Coastal Conservation and Development Commission: Land Commission may delegate functions to it, but must approve its actions (16.1).
Utah	State Land Use Commission: created by act, 9 members appointed by Governor, representing various levels of government and land use interests (4.1); state planning coordinator acts as executive director (4.4).
Washington	State Land Planning Agency: created by act, in Governor's Office (5-201).
Wisconsin	Department of Administration, State Planning Office; Land Resource Council: Chairman of each regional planning commission, plus 13 citizens including 6 elected local government officials (15.107(5)); Land Appeals and Review Board: 3 members with interest and expertise in land resources policies or related field (15.771); regional planning agencies; local units of government.

The remaining states (Idaho, Michigan, Minnesota, and Oregon) combine these two patterns. In Idaho the State Planning and Community Affairs agency performs most state-level regulation (most is done by local governments), but a special Local Government Approval Commission composed of representatives of affected local governments is convened when two local governments have denied a permit for development of regional benefit or when considering development of regional impact. Minnesota substitutes a group of regional development commissions like those of the Model Code for the state planning agency. These neither advise nor are advised by the Environmental Quality Council but work in cooperation with it. Michigan and Oregon are primarily of the second pattern, but the 7 member Land Use Commission (Michigan) and 7 member Land Conservation and Development Commission (Oregon) are provided with advisory councils representing different land use interests of the type optionally provided for state planning agencies in the first pattern. Oregon also has a joint Legislative Committee on Land Use which confirms some actions of the Land Commission.

The merits and defects of the two types of organizational structure are hard to compare. Both provide for the involvement of professionals and interested private citizens, as long as states choosing the first alternative have advisory councils. None of the defeated federal bills insists that a state adopt one pattern or the other. All three require only that a state have an advisory council of elected officials of local government, which would permit either the first pattern or a modified second pattern like that of Michigan and Oregon.

The proposed federal agencies are of course intended for administrative purposes only. HR 10294's Interagency Land Use Policy & Planning Board does, however, somewhat resemble a superior version of a state land use commission; while the agencies created by the other two federal bills, with their external advisors, suggest state planning agencies with advisory councils. If any one of the three federal bills were passed,some states might adapt the federal agency structure to the state level. But, at present, there is no compelling reason to choose one system over the other.

The Model Land Development Code also calls for the appointment, by the Governor or the highest state court, of a Land Development Adjudicatory Board to hear appeals of decisions of the regulatory agency. Only Florida's and Wisconsin's acts establish such a board: Florida Land and Water Adjudicatory Commission, composed of the Governor and cabinet, and the Wisconsin Land Appeals and Review Board, composed of three members with interest and expertise in land resources. In other states appeals are heard by the courts. The federal Senate Bill and HR 10294 merely require states to have some process of appeal; HR 1135 has no such requirements. A Land Adjudicatory Board could rule on other than strictly legal questions.

It would also have the practical value of taking over some of the work load from the courts. Conceivably it might serve to assure that appeals are decided by those who have special knowledge of land use. In the Florida example, however, the board is composed not of people with special professional knowledge, but of the Florida governor and cabinet.

B. STATE-LOCAL RELATIONSHIP

Table 2 is intended to serve as a brief summation of the four tables titled "Designating Critical Areas," Designating Developments & Activities of More than Local Impact," "Regulating Critical Areas," and "Regulating Developments and Activities of More than Local Impact."

For the Model Land Development Code and most of the states, "local governments implement state policies" is an accurate description. However, relationships between the state and local governments range from little or no role for local governments in Maine and Arkansas to extreme local control in Colorado. The three federal bills encourage local control but permit direct state regulation. The system adopted by each state would depend on that state's tradition of government. In Rhode Island, local governments have been active in development control and would undoubtedly continue to be active in a critical areas program.

C. TYPES OF CRITICAL AREAS

For convenience, this material appears in one table (Table 3); a case might be made for as many as five or six. It is difficult to categorize types of critical areas because of differing definitions of terms. For example, a complete breakdown would give critical resource areas (the term "critical areas" is sometimes used as a generic name for all geographic areas or even all matters of statewide or regional importance), key facilities (which may be classed as developments of regional benefit, or as critical areas if the surrounding area is included), development of regional impact, development of regional benefit, and large-scale development, including large-scale subdivisions and development projects. Development of regional impact may be merged with any or all of key facilities, development of regional benefit, and large-scale development. In the Utah act all matters of state concern are treated together. The Model Land Development Code has a three-way division: critical areas (including areas affecting or affected by key facilities and sites for new communities), development of state or regional benefit, and large-scale development.

Table 2

STATE-LOCAL (OR FEDERAL-STATE) RELATIONSHIP

ALI Model Code, Tentative Draft #3	Local governments implement state policies.
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	States implement federal policies to get grants.
Federal Land Use Planning Act of 1974 (H.R. 10294)	States implement federal policies for grants.
Proposed Substitute for H.R. 10294 (H.R. 1135)	State-oriented.
Arkansas	All of this power in state.
California	Policies drawn up by state; local governments implement, monitored by state.
Colorado	Most power in local government.
Florida	Local governments implement state-approved regulations.
Idaho	State must approve designation of, and regulations for critical areas; otherwise intervenes only when petitioned and only through affected local governments.
Iowa	State-centered with some local input.
Maine	State has all of this power.
Maryland	Primarily local control with state coordination and some state involvement.
Michigan	State-centered, but local governments have flexible control of critical areas.
Minnesota	Power divided between state, regional development commissions, and local governments.
New York	State establishes policies, and various levels of government implement.
Oregon	State-centered except for lack of critical areas control system.
Utah	Power divided between state and local governments.
Washington	Local implementation of state policies.
Wisconsin	Local implementation of state standards, with state review.

Table 3

TYPES OF CRITICAL AREAS

ALI Model Code, Tentative Draft #3	Areas significantly affected by, or having a significant effect upon an existing or proposed major public facility or other area of major public investment (7-201.3a); areas containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance (7-201.3b); proposed sites of new communities and surrounding land (7-201.3c).
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	Areas where uncontrolled development could result in irreversible damage to important historic, cultural, or esthetic values, or natural systems or processes which are of more than local significance, or could unreasonably endanger life and property as a result of natural hazards of more than local significance: coastal wetlands, marshes, and other areas inundated by the tide; beaches and dunes, significant estuaries, shorelands, and flood plains of rivers, lakes, and streams; areas of unstable soils and high seismic activity; rare or valuable ecosystems; significant undeveloped agricultural, grazing, and watershed lands; forests and related lands; scenic or historic areas, etc. (501e). Areas which are or may be impacted by key facilities: public facilities on non-federal lands which tend to induce development and urbanization of more than local impact; and major facilities on non-federal lands for the development, generation and transmission of energy (501.f).
Federal Land Use Planning Act of 1974 (H.R. 10294)	Areas of critical environmental concern: where uncontrolled or incompatible development could result in damage to the environment, life, or property or the long-term public interest which is of more than local significance: fragile or historic lands (significant shorelands of rivers, lakes, and streams; rare or valuable ecosystems and geological formations; significant wildlife habitats; scenic or historic areas; natural areas with significant scientific and educational values), natural hazard areas (flood plains and areas frequently subject to weather disasters, areas of unstable geological, ice, or snow formations, areas with high seismic or volcanic activity), renewable resource lands (watershed lands; aquifers and aquifer recharge areas, significant agricultural and grazing lands; forest lands etc.) (412a). Areas which are or may be impacted by key facilities: facilities open to the public which tend to induce development and land use of more than local impact: any airport with regular passenger service and other airports of greater than local significance, major interchanges between limited and frontage access highways (412b), major facilities on non-federal lands for the development, generation, and transmission of energy (412h).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Same as in H.R. 10294 (312a and 312g).
Arkansas	Areas representative of the various types of lands and habitats typical of those portions of the state still substantially untrammeled by the works of man; areas of substantially undisturbed natural qualities; habitats of rare, vanishing, or endangered plants and animals; areas of unusual aesthetic or ecological quality along the banks of rivers, lakes, or streams; areas in private ownership within the boundaries of national forests, wildlife refuges, state wildlife management areas, etc.: swamps, overflow lands, flood plains, or wetlands of unusual aesthetic or ecological quality; areas necessary or desirable as buffer zones; other lands or interests included in registry (10).
California	Areas of outstanding scientific, scenic, educational, historic, and recreational value, including wild and scenic rivers; fish and wildlife habitats; green belts and open space near cities; access to lake shores, beaches, or river banks; areas dangerous because of earthquake faults, unstable slopes, high fire risks, flooding, erosion, etc.; connecting links between recreational and open-space areas; high-impact areas influencing use of resources of statewide environmental interest (64952).
Colorado	Mineral resource areas; natural hazard areas: floodplains, wildlife hazard areas, geologic hazard areas; areas containing or having a significant effect on historic, natural, or archaeological resources of state importance; key facilities and surrounding areas: airports, major facilities of a public utility, areas around interchanges involving arterial highways, areas around rapid or mass transit terminals, stations, or guideways (106-7-201 and 202).
Florida	Areas of significant impact on or containing environmental, historical, natural, or archaeological resources of regional or statewide importance: areas significantly affected by or affecting an existing or proposed major public facility; proposed areas of major development potential (including new community sites) (5.2); not more than 5% of state (5.17).
Idaho	Areas containing or having a significant effect upon unique environmental, historical, natural, or archaeological resources of regional, statewide, or multi-state importance (67-1961).
Iowa	State areas of critical concern: fragile or historic lands (shorelands of rivers, lakes, and streams, rare or valuable ecosystems, significant wildlife habitats, rare or valuable geological formations, unique scenic or historic sites); natural hazard areas (flood plains, areas frequently subject to weather disasters, areas of unstable geological formation); renewable resource lands (watershed lands, aquifers and aquifer recharge areas, forest lands, etc.) (2.6); other designated areas (2.5). Local areas of critical concern: same categories but less important (2.7).
Maine	Areas containing or potentially containing plant and animal life or geological features worthy of preservation in their natural condition, or other natural features of significant scenic, scientific, or historic value (3312.2).
Maryland	Not specified.
Michigan	Land suitable for agricultural, horticultural, or forestry uses; sensitive or unique environmental areas: wetlands, wildlife habitats and surrounding areas; other undeveloped and irreplaceable natural areas; mineral resource areas; historic sites, structures, districts, and archaeological landmarks in National Register of Historic Places or designated by federal laws (82.1).
Minnesota	Areas significantly affected by or having a significant effect upon an existing or proposed major government development intended to serve large numbers of persons outside vicinity of location of development and tending to generate substantial development or urbanization (5.1); areas containing or having a significant effect on historical, natural, scientific, or cultural resources of regional or statewide importance (5.2).
New York	Area within 1000 feet of a frontage-access highway improved with state aid; area within ½ mile of interchange between limited and frontage-access highways; area adjacent to airport area within watershed for supply of domestic water improved with state aid; area within 500 feet of main water lines and trunk sewer lines constructed after effective date; area within 500 feet of mean high water level of lake or stream; area of statewide agricultural importance; areas of statewide historic, cultural, or aesthetic importance; areas of recreational, forest, water, mineral, or ecological significance (4-109.1); areas contiguous to above if necessary (4-109.2).
Oregon	Lands adjacent to freeway interchanges; estuarine areas; tide, marsh, and wetland areas; lakes and lakeshore areas; wilderness, recreational, and outstanding scenic areas; beaches, dunes, coastal headlands and related areas; wild and scenic rivers and related areas; flood plains and areas of geologic hazard; unique wildlife habitats; agricultural land (34.2); other areas.
Utah	Areas containing historical, natural, archaeological, or environmental resources of greater than local importance; areas containing important watersheds or proposed areas of major public facilities or other areas of major public investment; areas of major development potential, such as a proposed site for a power generation plant, an area identified as containing a major mineral deposit, a major industrial development, a new community, a major highway system; areas which, because of intrinsic qualities, are such that development or non-development will have a significant impact on the economic, recreational, or social opportunities of the citizens of the state(5.1e).
Washington	Areas of high disaster potential: unstable geology, high seismic or volcanic activity, or subject to flooding or weather disasters; areas containing rare or valuable ecosystem essential for the long range protection of the natural environment: wooded swamps, marshes, lakes, dunes, wet meadows, wildlife habitats, alpine and upland meadows, aquifer recharge areas, etc.; agricultural, grazing, and forest lands; lands within watersheds essential for water supply; scenic or historic areas; areas which because of their specific intrinsic qualities and certain locational characteristics are of substantial importance to the successful implementation of social and health service programs (4-502).
Wisconsin	Significant land resource areas: water supply, agriculture, historic, archeological, architectural, cultural, wetlands, wildlife habitat, primitive areas, scientific and natural areas, scenic, recreational, distinctive natural, mineral; proximity to major public facilities and investments and sites for future facilities of state government (33.31(3)).

HR 10294 uses a five-way split: critical areas, areas impacted by key facilities, development of regional benefit, large-scale development, and large-scale subdivisions or development projects. The other two federal bills use almost the same system, except that large-scale subdivisions are no longer in a separate category. The Maine and Arkansas acts apply only to critical resource areas.

Thus definitions of "critical area" vary considerably. The discussion which follows refers only to critical resource areas and key facilities; development and activities of more than local impact are covered in the next section.

1. Critical Resource Areas

The Model Land Development Code is not very specific about what areas may be considered to be critical resource areas, nor are Florida, Idaho, Maine, or several other states. None of these deviate far from the Model Land Development Code's definition ("an area containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance"[87]) except Maryland, which does not have a definition at all.

The three federal bills and some states list examples of critical resource areas. HR 10294's list is fairly typical:

> fragile or historic lands, including significant shorelands of rivers, lakes, and streams, rare or valuable ecosystems and geological formations, significant wildlife habitats, scenic or historic areas, and natural areas with significant scientific and educational values; natural hazard areas, including flood plains and areas frequently subject to weather disasters, areas of unstable geological, ice, or snow formations, and areas with high seismic or volcanic activity; renewable resource lands, including watershed lands, aquifers and aquifer recharge areas, significant agricultural and grazing lands, and forest lands, and such other areas as a state may designate.[88]

There are of course variations: Colorado adds mineral resource areas and California, green belts and open space near cities; and not many states find it necessary to designate areas of unstable ice and snow formation.

Agricultural and grazing land is not often designated as a critical resource area. Of all the state laws which have actually been passed, only Oregon's SB 100 lists farmland among critical resource areas, and under that law the state has no power over its

critical areas. The reason for this exception is undoubtedly a fear of over-restrictive government control of the lives and incomes of farmers:

> . . . the implications of the "taking" of large tracts of farms and forests under the guise of "land use" poses a serious and direct threat to the economic well-being of our citizens and their heirs. Indeed, such legislation smacks of the city dweller's view that the countryside is to be preserved as a "sandbox" for their amusement, allowing the locals to sell tickets to the visitors but to do little else.[89]

Founded or not, this fear is a strong force against the designation of agricultural lands as critical areas. Another form of control, such as giving farmers an economic incentive not to develop, by purchasing development rights or by taxing agricultural land at its use rather than to market value, might be more appropriate and is certainly more easily accepted.

2. Key Facilities

Another type of critical area is the "key facility." There is not a great deal of disagreement as to at least some of the land uses which may be called key facilities (or, to use the Model Land Development Code term, major public facilities). Implicitly or explicitly, most states would accept H.R. 10294's definition: "facilities open to the public which tend to induce development and land use of more than local impact . . . and major facilities . . . for the development, generation, and transmission of energy."[90] Most states would agree about including major airports, major highway interchanges, (usually) utilities, and the like. Most would agree about excluding

> any public facility located and operated within the jusisdiction of a local government, or an agency created by it, primarily for the residents of the local government; any section of a transportation system that is not used for regional or state transportation; any airport that is not to be used for instrument landings; and any educational institution serving primarily the residents of a local community.[91]

(Oregon does include public schools.)

It is difficult to determine exactly where key facilities belong in a scheme of classification of matters of statewide concern. The Model Land Development Code (setting aside development

by a public utility as development of regional benefit) includes areas significantly affecting or affected by key facilities with critical areas. The three federal bills and the states of Florida, Minnesota, Utah, and Wisconsin follow this example. Another way is to treat key facilities as development of regional impact or regional benefit, as do Idaho, Maryland, Michigan, Oregon, and Washington. Colorado and New York use a combination of the two systems. California uses the term "key facilities" for uses which in other states would be called development of more than local impact and does not give any examples. The definition can be interpreted to cover key facilities as more usually defined.

Both systems have their advantages. To classify key facilities with development of regional impact or benefit emphasizes the state's power over planning and siting; to put them with critical areas emphasizes state control of the surrounding areas once the facilities have been sited.

D. TYPES OF ACTIVITIES OF MORE THAN LOCAL IMPACT

This feature is summarized in Table 4.

1. Development of "Regional Impact" and of "Regional Benefit"

Only Idaho uses both these terms. "Development of regional impact" is defined as development having "a substantial adverse impact on at least one of the following counts: an increase in multi-jurisdictional services and facilities, the effect on the area's economy; or the environment, including problems such as air, water, or noise pollution."[92] "Development of regional benefit" appears to be merely Idaho's name for key facilities (for some reason including seaports, although Idaho doesn't have any).

The term "development of regional benefit" is otherwise used only by the three federal acts, which define it as

> land use and private development on non-federal lands for which there is a demonstrated need affecting the interests of constituents of more than one local government which outweighs the benefits of any applicable restrictive or exclusionary local regulations.[93]

"Development of regional benefit" is also used by the Model Land Development Code, which says the term includes:

- development by a governmental agency other than the local government within whose jurisdiction the propcsed development would be located or its agency;

Table 4

TYPES OF ACTIVITIES OF MORE THAN LOCAL IMPACT

ALI Model Code, Tentative Draft #3	Development of state or regional benefit: development by a governmental agency other than local government (7-301.1); development for charitable purposes, including religious or educational purposes, serving a substantial number of persons who do not reside within boundaries of local government (7-301.2); development by a public utility employed to a substantial degree to provide services outside of jurisdiction of local government (7-301.3); state or federal-aided development of types designated by state agency by rule (7-301.4). Large-scale development: development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of state or regional significance (7-404.1).
Federal Land Use Policy and Planning Assistance Act of 1972(S.632)	Development and land use of regional benefit: land use and private development on non-federal lands for which there is demonstrated need affecting the interests of constituents of more than one local government which outweighs the benefits of any applicable restrictive or exclusionary local regulations (501g). Large-scale development: private development on non-federal lands which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance (501h).
Federal Land Use Planning Act of 1974 (H.R. 10294)	Development and land use of regional benefit: private development and land use for which there is a demonstrable need affecting the interests of constituents of more than one local government and which outweighs the benefits of any applicable restrictive or exclusionary local regulation (412c). Large-scale development: private development on non-federal lands which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance (412i). Large-scale subdivision or development projects: division of land into lots or construction of housing units likely to present issues of more than local significance because of magnitude of effect on surrounding environment (412j).
Proposed substitute for H.R. 10294 (H.R. 1135)	Same as in H.R. 10294, except that large-scale subdivisions and development projects are not included (312b and 312h).
Arkansas	Not covered.
California	Any development that because of character, magnitude, or location would have a substantial effect upon the health, safety, or welfare of the citizens of more than one county (649051).
Colorado	Site selection and construction of major new domestic water and sewage treatment systems and extensions of existing ones; site selection and construction of solid waste disposal sites; site selection of airports; site selection and construction of major facilities of a public utility; site selection and development of new communities; efficient utilization of municipal and industrial water projects; conduct of nuclear detonations (106-7-203 and 204).
Florida	Any development which because of character, magnitude, or location has a substantial effect on the health, safety, or welfare of citizens of more than one county (6.1).
Idaho	Regional impact: development having a substantial adverse affect on increase in multi-jurisdictional services and facilities, area's economy, or environment (67-1931). Regional benefit: airports and seaports; systems of waste collection, treatment, or disposal; power generation and distribution facilities; major recreational sites and facilities; interchanges between interstate highways and frontage access streets or highways and interstate highway rights-of-way; other transportation systems of regional or state concern; domestic water storage and distribution systems; federal or state institutions. Not: any public facility located and operated within jurisdiction of local government for local residents; any segment of a transportation system not used for regional or state transportation; any airport not used for instrument landings; any educational institution serving primarily local residents (67-1941).
Iowa	Key facilities: major airports; major interchanges between interstate or other limited-access highways and frontage access streets or highways; major frontage access streets and highways; major recreational lands and facilities; major facilities for the development, generation, and transmission of energy (2.8); mining operations (2.5). Large-scale developments: any private development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance (2.9).
Maine	Not covered.
Maryland	Major public and private works and facilities which are of state concern because of function; size; legal status; authorization, location, or construction being legally within state jurisdiction; or any other reason (such as utilities, flood control works, water reservoirs, pollution control facilities, and military or defense installations)(2b5).
Michigan	Location of routes for state highways and widening state highways if new right-of-way to be obtained; areawide sanitary sewer plans and state and federal grants for sewage treatment facilities; sites for new state building, etc.; state and federal grants for airport construction or expansion; state grants for public transportation facilities (not buses); grants for ports or waterways development; condominiums and mobile home parks; sites for solid waste disposal and potential pollution sources if subject to state control; state grants for low and moderate income housing; projects proposed to be constructed under Public Law 83-566 (542).
Minnesota	Not covered.
New York	Development or expansion of highways or other transportation facilities or sewer or water services; development of other public facilities which will: affect 2 or more municipalities or be within 500 feet of boundary; employ or attract more than 100 employees or visitors in 1 day; provide more than 200 dwelling units; occupy more than 200 acres; or involve an application for state or federal aid; adoption or amendment of any control, plan, or other public document directly affecting the use of land which the review agency by regulation establishes as a designated action (4-102-1).
Oregon	Planning and siting of public transportation facilities; planning and siting of public sewage systems, water supply systems, and solid waste disposal sites and facilities; planning and siting of public schools (25.1); activities designated by Legislative Committee (26.1); siting of thermal power plants and nuclear installations (called "miscellaneous") (57).
Utah	Activities having a significant impact upon historical, natural, archaeological, or environmental resources of greater than local importance; activities having a significant impact upon important watersheds or proposed areas of major public facilities or other areas of major public investment (5.1e).
Washington	Airports and seaports of state and/or federal interest; major systems of solid or liquid waste disposal, collection, or treatment; major power distribution or general facilities; major recreational sites and facilities; transportation systems of regional or state concern; major water storage and distribution systems; major basic industrial developments; community service facilities. NOT: any public facility located and operated within the jurisdiction of a local government, or an agency created by it, primarily for the benefit of residents of that local government; any segment of the transportation system not used primarily for regional or state transportation; any educational institution serving primarily the residents of the local community (4-503).
Wisconsin	Developments with multi-jurisdictional impact: environmental problems; traffic; population; area; unique qualities of area; secondary development; impact on economy, services, taxes; housing, jobs, and regional economic benefits (33.41).

- development for charitable purposes, including religious or educational purposes, serving a large number of persons who live outside the boundaries of the local government;

- development by a public utility providing much service outside the jurisdiction of the local government; and

- state - or federal - aided development of types designated by the state planning agency.

The term could easily be interpreted to cover both key facilities and such developments as low and moderate income housing (as in Michigan), flood control works (as in Maryland), military or defense installations (as in Maryland), and solid waste disposal sites.

As for the term "development of regional impact," in states other than Idaho it does not refer only to development of adverse impact, as Florida's definition shows:

> any development that because of its character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one community.[94]

(California uses this definition for what it calls key facilities, an outstanding example of the variation that can occur in classifying matters of statewide importance.) Other states omit the definition and simply make a list, but the lists show nothing which could not be covered by Florida's definition. It is a broad definition and covers both development of regional benefit (including key facilities) and large-scale development, discussed in the next section.

2. Large-Scale Development

Only the Model Land Development Code, the three federal bills, and the Iowa bill name large-scale development as such. All five use the same definition with a few variations (Iowa specifies private development and the federal bills, development on non-federal lands): "development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of state or regional significance."[95]

Other states, however, include large-scale development in other categories. Florida's definition of development of regional impact and California's of key facilities cover large-scale development. Wisconsin's bill refers to developments with multijurisdictional

impact. Colorado places the siting of new communities among its activities of state interest (Colorado's equivalent for development of regional impact). The Model Land Development Code lists proposed sites of new communities as a critical area. Washington includes major industrial developments among its developments of regional impact. States with control over major sewer and water supply construction and extension, like Colorado, Washington, Oregon, and New York, can at least guide land developments. The magnitude of the effect of other types of important development on the environment is often also considered. In general, however, development that is of more than local importance simply because of large scale is not as widely regulated as other matters of state importance.

H.R. 10294 also mentions large-scale subdivision and development projects, "division of land into lots or construction of housing units likely to present issues of more than local significance because of the magnitude of its effect on the surrounding environment".[96] This is really a special case of large-scale development and should be treated as such.

E. DESIGNATING CRITICAL AREAS

Before critical areas legislation can be enforced, the specific areas to be regulated must be identified (see Table 5). For some matters of state importance, such as the condominiums and mobile home parks mentioned in the Michigan bill, there is little problem in establishing definitions. It is, however, possible to question whether a particular area is, for example, "an area containing or potentially containing plant and animal life or geological features worthy of preservation in their natural condition, or other natural features of significant scenic, scientific, or historic value,"[97] or whether a development, "because of its character, magnitude, or location has substantial effect on the health, safety, or welfare of the citizens of more than one county."[98] It is necessary to formulate some process for designating areas and developments which meet these definitions, and the three federal bills require that each state establish a process in order to be eligible for a grant.

Some states have two different procedures for designating critical areas (both critical resource areas and key facilities where these are classified as critical areas) and for designating those developments of regional impact which are not already clearly designated by law. This pattern follows the Model Land Development Code. Colorado, Washington, and Utah have one procedure for both. In Maryland, Michigan, and New York, all developments of regional impact are defined specifically in the law. The Maine and Arkansas acts apply only to critical resource areas; and the Minnesota act,

Table 5

DESIGNATING CRITICAL AREAS

ALI Model Code, Tentative Draft #3	State Land Planning Agency designates specific areas by rule, specifying boundaries, reasons for designation, dangers of uncontrolled or inadequate development, general principles for guiding development, and what development shall be permitted pending adoption of regulations (7-201-1) and giving notice to affected local governments (7-201.2).
Federal Land Use Policy and Planning Assistance Act of 1972(S. 632)	Within 3 years each state must establish a method for inventorying and designating areas of critical environmental concern and areas which are or may be impacted by key facilities (302.a8) and designate all substantial areas of critical environmental concern of major national significance (at request of Governor, Secretary of Interior shall supply list) (304a).
Federal Land Use Planning Act of 1974 (H.R. 10294)	State planning process must have criteria for identification of areas of critical environmental concern and of areas suitable for or which may be impacted by key facilities, and provide for appeal of designation or exclusion (104h).
Proposed Substitute for H.R. 10294 (H.R. 1135)	State planning process shall include definition, identification, and designation of areas of critical state concern and areas suitable for or which may be impacted by key facilities (104h). Indian tribes shall provide methods for identifying critical areas and areas which are or may be impacted by key facilities (201b2).
Arkansas	Chosen by Commission and put in Registry of Natural Areas (9a & f); designation not effective until after Governor and Director of Department of Planning have had 30 days notice (101).
California	Anyone may propose one to a local public agency; agency holds hearing and proposes to Commission; designated by Legislature acting upon Commission's Critical Area Report (64953-64960).
Colorado	Local government designates after holding a hearing, giving notice to Commission, in newspaper and in mailing list (106-7-404-406).
Florida	Recommended by state planning agency and designated by Administration Commission (5.1)
Idaho	Petition for proposed designation made by city, county, or group of registered electors (25% of voters in last election); state agency issues proposed designation if petitioned or on its own judgement; official designation takes effect when approved by legislature (67-1962).
Iowa	State areas of critical concern: commission recommends designation, specifying criteria developed, reasons for designation, damages from uncontrolled development, reasons for implementation of state regulation, suggested regulations for area (S.14); area is designated by General Assembly (2.6). Local areas of critical concern: designated by a city or county (2.7; 17.3a).
Maine	State Planning Agency,with advice and approval of board, shall establish register of critical areas, considering: unique or exemplary natural qualities of area or site, intrinsic fragility of area or site, present or future threat of alteration or destruction, economic implications of inclusion in register (3314.1); area may be removed from register if protection no longer necessary (3314.5).
Maryland	Every county and city of Baltimore submit recommendations to Department, which makes final identification (2b3).
Michigan	Commission promulgates rules designating specific areas (81.1) or county or regional planning agency may designate areas in its land use plan or recommend areas to commission for designation (81.2).
Minnesota	Council, upon its own initiative or recommendation of regional development commission or local government, recommends area to Governor for designation (6.1); Governor may designate area for 3 years (6.2); designation must be approved by regional development commission (or legislature if none exists) to be permanent (6.2).
New York	Areas of statewide agricultural importance, by Agricultural Resources Commission; areas of statewide historical, cultural, or aesthetic importance, by New York Historic Trust, Council on the Arts, Council on Architecture, or Natural Beauty Commission; areas of statewide recreational, forest, water, mineral, or ecological significance, by Department of Conservation (4-109.1); other areas on list designated automatically.
Oregon	Designated by Legislature upon recommendation of Joint Legislative Committee on land use upon recommendation of Land Commission (26.2).
Utah	Within 90 days of effective date of act local governments, by metes and bounds or other appropriate method, identify areas within own boundaries (6.1); commission consults with affected local governments and may add but not subtract proposed areas (6.2); commission identifies areas for local governments not submitting recommendations (6.2); commission holds hearings in each affected county (6.3); commission submits final statewide plan specifically designating areas to legislature for official designation, no later than January 1, 1975 (6.3).
Washington	State agency prepares proposed criteria for designation and submits to local governments, regional planning offices, state agencies and affected federal agencies; local government submits comments and proposed changes; state agency designates specific areas (5-404); state agency may also designate in an emergency for period not over 2 years; but areas designated in an emergency shall not exceed 1% of state land area (4-501 & 4-502). Guidelines for designation and regulation: protect statewide and regional over local interests; prefer long-term over short-range benefits; provide for health, safety, and well-being of all people of state; protect natural environment; preserve, protect, and restore areas of unique scenic, historic, or aesthetic values; preserve and protect areas of substantial importance to wildlife; prefer development consistent with control of pollution and prevention of damage to environment or development dependent upon use of particular geographic location (5-102).
Wisconsin	Department prepares standards, with review and advice from other agencies, including Land Resource Council, and public hearing; then adopts standards and designates areas by standards (33.22-33.25, 33.31).

only to critical areas, including areas affecting or affected by key facilities.

Under the Model Land Development Code, the state planning agency designates critical areas by rule, specifying the boundaries of a designated area, the reasons it is to be considered critical, the dangers of uncontrolled or incompatible development, the advantages of coordinated development and the development to be permitted pending the adoption of regulations. Usually, with some other variations such as no specification of interim standards, this is the normal procedure for designating critical areas.

The authority for selecting critical areas varies among different programs. A designation may be proposed by either the state agency or a local government (local input is not always specified, but no law bars a state agency from accepting suggestions). In California proposals may be offered by anyone concerned; and in Idaho, by a group of registered electors equal in number to 25 percent of the voters in that city or county in the last gubernatorial election. In Maryland and Utah, local governments must submit proposals, which in Utah may not be rejected by the Land Use Commission.

There are also different provisions for final designation of areas. In California, Idaho, Oregon, Iowa, and Utah the designation must be confirmed by the legislature. The Governor may also be involved. In Florida, designation must be confirmed by the Governor and cabinet. In Arkansas, the Governor must be given 30 days' notice In Minnesota, the designation becomes effective when made by the Governor upon the recommendation of the Minnesota Environmental Quality Council, but must be approved by the legislature or the appropriate regional development commission within three years in order to be permanent.

Other agencies are frequently involved. In New York, critical areas are designated not by the State Office of Planning Coordination but by the Agricultural Resources Commission, the New York Historic Trust, the Council on the Arts, the Council on Architecture, the Natural Beauty Commission, or the Department of Conservation, whichever is appropriate. In Colorado critical areas are designated by local governments, after a hearing of which notice is given to the Colorado Land Use Commission. In Michigan areas may be designated by either the State Land Use Commission or a county or regional planning agency.

Some states restrict the amount of land which may be designated. A provision of Florida's law which has caused problems is its limit of five percent of the total area of the state. Some fear allowing the government to control too much land, but five percent is so low a limit in Florida that it could not begin to contain the areas in need of protection. Washington also has a limit on the amount of

land which may be designated: one percent on areas designated by the State Land Planning Agency in an emergency. This limit does not affect the normal designation process.

F. DESIGNATING ACTIVITIES OF MORE THAN LOCAL IMPACT

As for designating developments of regional impact (see Table 6), in most cases either criteria are so well defined by the law as to make a special designation process unnecessary, or specific criteria are formulated by the state land planning agency. In drawing up these criteria the state agency considers certain prescribed factors, of which the *Model Land Development Code* gives a typical list:

- the amount of pedestrian or vehicular traffic likely to be generated;
- the number of persons likely to be present;
- the potential for creating pollution, noise, etc;
- the size of the site; and
- the likelihood of additional or subsidiary development.

For example, all development which would provide more than 200 dwelling units or occupy more than 200 acres might be designated, as in New York. In Washington, where this procedure is also used for designating critical areas, criteria must be reviewed by local governments, regional planning offices, other state agencies, and affected federal agencies.

In Idaho the procedure for identifying regional impact is somewhat different: developments of regional impact are designated individually. If a city, county, or group of registered electors equal in number to 25 percent of those who voted in the last gubernatorial election petitions the state agency, claiming that development under a permit granted by another local government would have an adverse impact on the provision of multijurisdictional services, the area's economy, or the environment, the state agency must convene a Local Government Approval Commission (composed of the chairman of the board of county commissioners, or his delegate, from each affected county, the mayor or a city councilman from each affected city, and one representative of each affected school district and highway district) to consider the claim. This is a cumbersome method of designating developments of regional impact, as it requires separate proceedings for each development, proceedings which are set in motion only after a permit has been granted, perhaps even after the development has been begun.

Table 6

DESIGNATING ACTIVITIES OF MORE THAN LOCAL IMPACT

ALI Model Code, Tentative Draft #3	Development of state or regional benefit: automatically designated, except that types of state or federal-aided development to be considered of regional benefit must be specified by state agency by rule (7-301.4). State agency shall adopt rules for definition of large-scale development, considering amount of traffic likely to be generated, number of persons likely to be present, potential for creating pollution, noise, etc., size of site, likelihood of additional or subsidiary development (7-401); rules may vary for different parts of state to reflect varying local conditions (7-401.3).
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	Within 3 years each state must establish method for identifying development and land use of regional benefit and large-scale development (302a7); in identifying large-scale development state shall consider, among other things, amount of traffic likely to be generated, number of persons likely to be present, potential for creating pollution or noise, size of site, likelihood of additional or subsidiary development (501h).
Federal Land Use Planning Act of 1974 (H.R. 10294)	State planning process must provide criteria for identification of large-scale development and land use of regional benefit (104h). In determining large-scale development, state shall consider (among other things): amount of pedestrian or vehicular traffic likely to be generated; number of persons likely to be present; potential for creating environmental problems such as air, water, or noise pollution; size of site to be occupied; likelihood of additional or subsidiary development (4121). Planning process shall provide for appeal of designation or exclusion (104h).
Proposed substitute for H.R. 10294 (H.R. 1135)	State planning process shall include definition, identification, and designation of large-scale development and land use of regional benefit (104h). Indian tribes shall provide methods of identifying areas suitable for potential large-scale development (201b2).
Arkansas	Same as for critical areas.
California	Department shall recommend and Commission shall adopt criteria for determining these, considering likely cost, pollution, traffic, number of persons present, size of area affected, additional development, etc. (64980-64981).
Colorado	Same as for critical areas.
Florida	Guidelines and standards for definition to be drawn up by State Planning Agency, after consultation with Environmental Study Committee, and recommended to Administration Commission for adoption (6.2). Agency shall consider: pollution and noise created or alleviated, traffic generated, number of persons present, size of site occupied, likelihood of more development, unique qualities of particular area (6.2).
Idaho	Regional impact: individual developments designated when city, county, or group of registered electors (25% of voters in last election) petitions State Agency to start proceedings, showing that another local government's approval of a permit would have adverse impact on it (67-1931). Regional benefit: automatically designated by being listed in act; State Agency may designate other sizes and types of development (67-1941).
Iowa	Key facilities: Commission establishes and General Assembly adopts criteria; General Assembly designates (5.15, 5.16, 2.8); mining operations are automatically designated. Large-scale development: Commission establishes criteria, considering likely traffic, number of persons present, pollution, size, additional development, etc. (5.16); General Assembly adopts criteria (5.16); Commission designates (2.9).
Maine	Not applicable.
Maryland	All works and facilities of this nature presumably automatically designated.
Michigan	All developments and grants listed are designated.
Minnesota	Not applicable.
New York	Areas on list designated automatically.
Oregon	First group designated by Land Commission (25); others, in same way as critical areas (26.1;24.2); siting of thermal power plants and nuclear installations designated automatically.
Utah	Same as for critical areas.
Washington	Same procedure as for critical areas, without emergency provisions. Consideration shall be given to effect outside of local jurisdiction, including amount of traffic; number of persons present; physical, social, and economic impact; size of site; intrinsic qualities of site; likelihood of more development, effect on environment; cost; effect on public facilities; effect on goals and objectives of state and regional land-use plans (8-404); same guidelines for designation and regulation as for critical areas.
Wisconsin	Department adopts standards based on criteria in statute; regional planning commissions may recommend types of development to Department; Land Appeals and Review Board holds hearing and advises before standards adopted (33.41).

G. REGULATING CRITICAL AREAS

In the pattern for adoption of regulations which is prescribed by the Model Land Development Code and followed by most states (see Table 7), critical areas are regulated by local governments under rules drawn up by the local governments and approved by the state planning agency. Typically, upon designation of a critical area, local governments must submit their relevant regulations, both existing and proposed, to the state agency for review. If within a given time period a local government does not submit satisfactory regulations, the state may adopt regulations, to be enforced by the local government as if they were its own. Some states add a provision that if, after the state adopts regulations for a critical area, a local government proposes satisfactory ones, these shall supersede the state-adopted regulations.

Not all states follow this pattern. In Colorado, the state land use commission may make suggestions to the local governments but may not force any changes or new regulations upon them. In Utah the rules and regulations are drawn up by the state land use commission and adopted by the legislature. In Maine and Arkansas no regulations can be adopted unless some governmental agency (or, in Maine, a private citizen interested in protecting the environment) acquires financial interest (or in Maine, makes a management agreement, undoubtedly involving some financial consideration in almost every case) in the critical resource area. In Maine, the owner must notify the Critical Areas Board of his intent to develop and must not do so for 60 days (presumably to allow the board to negotiate for some interest) unless the board issues a release. And, in Maryland and Oregon, all power to regulate critical resource areas is at the local level.

Once regulations are adopted, they must be administered. Again, this is usually done by the local governments, with the state agency monitoring them. Permits are required for development in critical resource or key facility areas in almost every case. These are usually issued by the local government with state review of the application, as the Model Land Development Code prescribes. In Iowa, however, it is the other way around: the permit application must be made to the State Land Use Policy Commission and reviewed by affected local governments and state agencies.

In New York, critical areas may be regulated either by the State Office of Planning Coordination or by any county or regional agency it designates; whether or not permits are required is a decision left to the regulatory agency. The state office retains the power to revoke a permit granted by a designated regulatory agency on the grounds that the permit was not authorized when it was granted.

Table 7

REGULATING CRITICAL AREAS

ALI Model Code, Tentative Draft #3	Designation suspends local powers to grant development permits to extent specified (7-202.2); local government submits regulations to State Agency for approval (7-203); if local government fails to submit regulations within 6 months, state agency adopts same (7-204); if no regulations adopted within 1 year designation terminated (7-205); same for amendments (7-200). Permits granted by local land development agency (7-207.1) before regulations adopted, only if specifically permitted by designation or needed in emergency AND would have been permitted by ordinance in effect immediately before designation, with notice given to State Agency (7-207.2 and 7-208); after regulations adopted, only if in accordance with regulations (7-207.3) and notice of application for special development permits must be given to State Agency (7-208.2); decision may be appealed to State Land Adjudicatory Board (7-702.1).
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	Within 5 years state must develop methods of implementation for assuring that land use in critical areas and areas impacted by key facilities, including site location and location of major improvements and major access features of key facilities, is not inconsistent with state land use program (303b1); method of implementation shall encourage land use controls by local governments: one or a combination of local implementation of state policies with state authority to disapprove/direct state control (303.b2); state may use police powers to prohibit development (303b.2c); method of regulation shall include appeal procedure (303b.2a); if state has not established satisfactory planning program within 5 years responsible federal agency shall hold public hearing on proposed major federal actions affecting non-federal land, and submit findings to Secretary of Interior and if appropriate to Secretary of Housing and Urban Development (307b).
Federal Land Use Planning Act of 1974 (H.R. 10294)	State may use direct state land use planning and regulation, local administration subject to state disapproval, or both (106a); method of implementation shall include appeal procedure (106c2); where any major federal action significantly affecting use of non-federal lands is proposed after 5 years in state not eligible for grant, responsible federal agency shall hold public hearing and report to Secretary of Interior (110); state must develop explicit policies to guide land use in critical areas, considering: aesthetic and ecological value of wetlands, susceptibility of wetlands to permanent destruction by draining, etc., value of watershed land for storing and controlling runoff water, value of managing watershed lands to regulate water yield and retention costs of development on flood plains or in areas of unstable soil or high seismic activity, undesirability of locating development that encourages more development in critical areas, values and limited extent of critical areas, production, storage, etc. of energy (104i); process should provide methods to insure that in areas of critical environmental concern values will not be impaired and dangers will be minimized and that substantial development is approved or disapproved in accordance with state policies after appropriate public involvement (105b); planning process shall provide method of controlling land use in areas impacted by key facilities, including site location of key facilities and major improvements, and major access features (105d).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Method of regulation (except that must have one) left to state (104h); states encouraged to use local governments in implementation (105a); Indian tribes must assume control over use and development of land in areas of critical concern and impacted by key facilities for grants (201 & 6A).
Arkansas	Commission acquires fee or other interest in real property; does not have power of eminent domain and must convey fee title to some other state agency or department (9b); Commission makes such policies, rules, and regulations as it sees fit (9c); these regulations do not apply to lands or interests in Registry but not actually acquired (9f).
California	Commission draws up development guidelines and reviews local regulations for consistency; if local regulations not satisfactory or nonexistent, commission's guidelines used; permits issued by local governments, which must notify commission of all applications; commission may request Attorney General to petition Superior Court for injunctions against violations or in emergencies (64972-64978).
Colorado	Local government draws up regulations and sends to Commission for review; Commission may suggest but not require changes; permits required; available from local government after hearing; denial of permit subject to judicial review; either Commission or local government may enjoin non-permit holders from developing (106-7-501 & 502).
Florida	Local government submits existing or new regulations to State Planning Agency for review;if none or unsatisfactory, State Agency and Administration Commission establish regulations (55-58); regulations to be carried out by local governments through existing processes if possible (2); if State Agency thinks local enforcement inadequate it may sue (5.9); local governments must notify State Agency of development orders (5.16); development orders may be appealed to Land and Water Adjudicatory Commission (7.2).
Idaho	After proposed designation, local government submits existing and proposed regulations to state for review; if none or if unsatisfactory, state writes them (67-1965; 1966); if designation did not originate with State Agency, moratorium on development may be declared, to last until dissolved by legislative action, designation defeated, or legislature adjourns (67-1963); local ordinances must require permits for development in critical areas and contain standards for permits; State Agency must be notified of applications (67-1970).
Iowa	State areas of critical concern: permits required, granted by Commission after review by affected local and state agencies (11); if someone undertakes development without permit, Attorney General may sue (14); Department of Soil Conservation may enter to investigate actual or alleged violations; if refused admittance, may get search warrant (12). Local areas of critical concern: regulated by a city or county (17.3a).
Maine	State Planning Office shall recommend to appropriate state agencies, or local governments, or private citizens interested in protection of critical areas, to acquire property rights or establish management agreements to protect critical areas (3314.3); present or prospective owner shall notify board of any proposed change of use or character of a critical area; change must not take place for 60 days unless board issues release (3314.4).
Maryland	Not specifically described; presumably done by local governments.
Michigan	Municipality regulates critical areas within own boundaries by rules which may not be less strict than provisions of act or commission's rules and which must be approved by commission (85); county regulates other areas (84.1); permits available from municipality or county: application must contain assessment of impact and be reviewed by county, regional planning commission, and commission (71 & 72); decision may be appealed to commission (91.1); violators guilty of misdemeanor (101) and conspirators to violate of felony (102); commission gives decision if impact of development crosses jurisdictional lines (72 &3).
Minnesota	Local plans and regulations must be approved by regional development commission and by Council (7); if none or if satisfactory, Council regulates (9.1); Council can sue for adequate enforcement (9.4); permits granted by local government in accordance with adopted plans and regulations; if none, if permitted by designation, needed in emergency, or previously permitted and Council must be notified (12.2 and 12.4a); Council must be notified of applications for special permits (12.4b).
New York	State must approve local plans for critical areas, which should have if appropriate: land use plan, street and highway plan, mass transport plan, plans for public services and facilities, public buildings and community design, recreation plans for parks, playgrounds, etc., conservation plan, etc. (4-110); state or any county or regional board it designates may regulate critical areas, may require permits (4-111 to 4-116); state may revoke permits on grounds that not authorized when granted; developer may request hearing (4-114).
Oregon	Left to local governments if done at all, except that they get priority consideration in preparing and adopting statewide planning goals and guidelines (34).
Utah	Along with plan Commission submits proposed rules and regulations, and proposed means for enforcing them, to the legislature for final adoption (7.1a).
Washington	State reviews local regulations, existing and proposed, and helps local governments write more; if none or if unsatisfactory, state writes them (5-603); state can sue for adequate enforcement (5-603); special development permits required and available from local government, which shall notify state of applications (5-603); may be revoked if violated or in emergency or if not acted on in 2 years (2-806); decision on permit may be appealed (2-805); local government may sue, obtain enforcement order, and prosecute violators (9-201).
Wisconsin	Department requests local government to consider standards and take appropriate action to meet them (33.32); local government adopts regulations or amendments within 6 months, during which time Department may freeze land use (33.33); local action or inaction may be appealed by certain entities to Land Appeals and Review Board, which may require local government to adopt and enforce adequate regulations, may require Department to do so if local government fails to and may seek enforcement in court (33.65).

In New York, critical areas may be regulated either by the State Office of Planning Coordination or by any county or regional agency it designates; whether or not permits are required is a decision left to the regulatory agency. The state office retains the power to revoke a permit granted by a designated regulatory agency on the grounds that the permit was not authorized when it was granted.

No means of implementing critical areas regulations has yet been fixed in Utah. The State Land Use Commission is to draw up a program and submit it to the legislature for adoption.

The granting or denial of a permit may generally be appealed; in Florida, to the Governor and cabinet; in Michigan, to the state land use commission; and in other states, to the courts.

Finally, many states provide some means of insuring that the regulations are actually enforced. In California, Iowa, and Michigan the state may obtain an injunction against those who develop without a permit. In Washington, a local government may bring action against offenders; in Colorado, either the state or local government may. The Michigan bill also states that a violation is a misdemeanor punishable by fine or imprisonment or both and that conspiracy to violate is a felony. In Minnesota and Florida, the state may sue local governments if their enforcement is inadequate. In Wisconsin, inadequate local regulations, administration, or enforcement may be appealed to the Land Appeals and Review Board by the owner or applicant, a nearby owner, a government agency, a citizen if the situation affects public rights in navigable waters, or a citizen or group having a "real and substantial interest."

H. REGULATING ACTIVITIES OF MORE THAN LOCAL IMPACT

In general, the process for regulating developments of regional impact (see Table 8) is much like that for regulating critical resource or key facility areas. A frequent requirement of regulations is that the development be consistent with a state land use plan. The Model Land Development Code has a criterion that the development must be allowed by the applicable local development ordinance or that its probable net benefit must exceed its probable net detriment. Factors to be considered in determining whether or not benefit exceeds detriment include, besides consistency with local and state development plans:

- the appropriateness of the location compared to that of other available locations;

- the effect on the environment and on other persons and property;

Table 8

REGULATING ACTIVITIES OF MORE THAN LOCAL IMPACT

ALI Model Code, Tentative Draft #3	Development of state or regional benefit: special development permits issued by local land development agency; notice must be given to state agency and to Attorney General if for charitable purposes, and to Public Utility Commissioner if public utility (7-302.2); permit shall be granted if satisfies local development ordinance (7-303.1) or probable net benefit exceeds probable net detriment (7-303.2); factors to be considered: appropriateness of location, impact on environment, effect on other persons and property, if area already has its share of that type of development, effect on ability to find housing near work, effect on municipal services and tax burden, public transportation, etc.; effect on objectives of government development and state and local land development plans (7-502); decision may be appealed to State Land Adjudicatory Board (7-702.1). Large-scale development: special permits issued by local land development agency; notice given to state agency and in mailing list on request (7-403); granted if: probable net benefit exceeds probable net detriment and is consistent with local development ordinance and state and local land development plans or is necessary for many people to obtain reasonable access to housing, employment (but housing must be available), education or recreation(7-403.3 and 7-404); decision may be appealed (7-702.1); exception: if land not covered by development ordinance and no land development agency appointed after 90 days, permit not required (7-402).
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	Same as for critical areas.
Federal Land Use Planning Act of 1974 (H.R. 10294)	Same as for critical areas. Development and land use of regional benefit: planning process shall assure that local regulations do not unreasonably restrict or exclude development and land use of regional or national benefit (105f). Large-scale development: planning process shall provide method to control proposed large-scale development of more than local significance in its impact upon the environment (105e). Large-scale subdivision and development projects: planning process shall provide methods to consider the environmental, economic, and social impact of large-scale development projects, including: problem of inconsistency of projects with state comprehensive land use planning process, problem arising when developer cannot afford proposed improvements and amenities, problem of excessive burden on municipal services, construction processes causing unreasonable erosion and runoff problems of haphazard and unplanned growth in critical areas, problems associated with absence of balanced community needs, such as open space, parks, transportation, housing (105h).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Same as for critical areas, plus Indian tribes regulate land use for public facilities and utilities (201b6a).
Arkansas	Not applicable.
California	Permits issued by local government, which must notify Commission and areawide clearinghouse (if one exists) of application and consider whether or not development is consistent with State Land Use Policies Report and report of areawide clearinghouse (64986-64989).
Colorado	Same as for critical areas.
Florida	Developments of more than local impact may be undertaken if, on land under jurisdiction of a local zoning ordinance, local government gives permission, first holding hearing and notifying state and regional planning agencies; if, in critical area, that procedure is followed; if neither, developer gives notice to local government and state agency and neither zoning regulations nor a critical area designation is issued in 90 days (6.5-6.11).
Idaho	Regional impact: if state agency receives petition to initiate proceedings it convenes Local Government Approval Commission, which holds hearings and gives decision, considering: cost; effect on public transportation and other public facilities; objectives of development built or aided by public agencies; public utility and municipal servies; economy; people's ability to find accessible jobs, housing, educational and recreational facilities; ability of local government to implement local or regional comprehensive plan (67-1938). Regional benefit: permits issued by local government; if 2 or more deny, developer may petition state agency to convene Local Government Approval Commission, which holds hearings and gives decision considering if development needed, dangerous, etc., and effects as for regional impact (67-1942-1944); city or county chosen as site may appeal (67-1946).
Iowa	Commission shall establish criteria for approval (9.3, 9.4, 9.6); same permit system, etc., as for state areas of critical concern (11, 14, 12); Director of Department of Soil Conservation may inspect mines at any time and refer violations not corrected within 90 days to State Soil Conservation Committee (35).
Maine	Not applicable.
Maryland	Local governments issue permits and must notify Department of all applications (29).
Michigan	Regulated by state agencies; must be reviewed by Commission for consistency with state landuse plan (54.2, 54.3).
Minnesota	Not applicable.
New York	Review agency must review all proposals for these activities; if undertaken contrary to review agency's recommendations, review agency may seek injunction (4-103 and 4-104). State Office of Planning Coordination shall establish rules and regulations for review (4-106).
Oregon	Permits issued by Land Commission, with review by affected state and local agencies (27); if undertaken without permit, Land Commission may investigate, sue, etc. (30.5 and 31); permit from Nuclear and Thermal Energy Council necessary for thermal power plants and nuclear installations; notice must be given to Department of Environmental Quality, Water Resources Board, Fish Commission, Game Commission, Board of Health, State Engineer, State Geologist, Forestry Department, Public Utility Commissioner, Department of Agriculture, Department of Transportation, Department of Land Conservation and Development, Economic Development Division (57).
Utah	Same as for critical areas.
Washington	Same permit system as for critical areas, plus local governments must notify other affected local governments and anyone who wants a mailing list of applications (5-604).
Wisconsin	Developer applies to local government; notification, review, and hearing procedures are set (33.42); local government approves or denies, based on specified findings; actions which restrict certain critical needs are subject to review by Land Appeals and Review Board (33.43).

- whether the area already has its share of that type of development (if the proposed development would impose immediate cost burdens on the local government);

- the effect on people's ability to find adequate housing near their work;

- the effect on the provision of municipal services and the tax burden, on public transportation, and on the objectives of government development.

Presumably because a state land development plan already takes these considerations into account, the states are, except for Idaho, not as specific.

Florida's law considers the possibility that development of regional impact may be proposed in an area not covered by a local ordinance. If this happens, the development may not begin for 90 days after the developer gives notice to the state planning agency and to any local government with power to enact a zoning ordinance. This procedure gives the local government an opportunity to adopt regulations. The state planning agency also then has the opportunity to insure a critical area designation.

Idaho's process is very different. If a local government or a group of registered electors complains that development under a permit issued by another local government would have an adverse effect on the provision of municipal services, on the area's economy, or on the environment; or if a permit for development of regional benefit has been refused by two or more local governments, then a Local Government Approval Commission (composed of representatives of each affected city, county, school district, and highway district) must be convened to give a decision. The Local Government Approval Commission must consider essentially the same factors as the Model Land Development Code requires for consideration in determining whether a development's probable net benefit exceeds its probable net detriment.

I. RELATIONSHIP TO OTHER LAND USE CONTROLS

For most states, the only information readily available on this point (see Table 9) was whether the critical areas provisions were part of a broad land use planning act. The Model Land Development Code, not yet completed describes such an act. All three federal bills require the states to establish planning processes but require control only of critical areas, developments of regional benefit, and large-scale development.

Table 9

RELATIONSHIP TO OTHER LAND USE CONTROLS

ALI Model Code, Tentative Draft #3	Part of broad, not yet completed land use code.
Federal Land Use Policy and Planning Assistance Act of 1972 (S. 632)	Does not expand or diminish federal, interstate, or state jurisdiction, responsibility, or rights in field of land and water resources planning, development, or control (512g); does not delay or otherwise limit state adoption or enforcement of no less stringent controls than required by Federal Water Pollution Act, Clean Air Act, etc. (512e); does not adopt any federal policy or requirement prohibiting or delaying states or local governments from adopting or enforcing stricter controls than required by this Act (512f).
Federal Land Use Planning Act of 1974 (H.R. 10294)	Does not expand or diminish federal, interstate, or state jurisdiction, responsibility, or rights in the field of land and water resources planning, development, or control (411a); does not supersede, modify, or repeal existing laws applicable to the various federal departments and agencies authorized to develop or participate in the development of land and water resources or to exercise licensing or regulatory functions in relation thereto, nor affect the jurisdiction, powers, or prerogatives of the International Joint Commission (U.S. & Canada), Permanent Engineering Board, U.S. operating entities established pursuant to Columbia River Basin Treaty, or International Boundary and Water Commission (U.S. & Mexico) (411e). Coastal Zone Management Act of 1972: does not prevent any eligible state from getting grants under Coastal Zone Management Act; each state must coordinate planning under 2 acts; not applicable to transitional and intertidal areas, salt marshes, wetlands, or beaches unless state does not have approved program under Coastal Zone Management Act, or to other coastal waters at all (411f). Act also provides for: study of Indian reservations and other tribal lands (201); planning of public lands (National Park, Forest, and Wildlife Refuge Systems, etc.) (301-304).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Same as H.R. 10294 (311a and 311c), except as concerns Coastal Zone Management Act of 1972: does not supersede, repeal, or conflict with Coastal Zone Management Act; coastal states should coordinate planning under 2 acts (311f).
Arkansas	Not part of broad act. Repeals all conflicting laws (18).
California	Not part of broad act; has no effect within permit zone designated pursuant to California Coastal Zone Conservation Act of 1972. Defeated bill for authorizing tax on transfer of real property to acquire and maintain open-space lands (64902.7).
Colorado	Also has law providing for local land use planning; law providing for municipal and other master plans for rapid and mass transit, arterial highways, and major facilities of public utilities, which local governments must consider in administering activities and areas of state concern (106-7-202 and 204). Not part of larger act.
Florida	Not part of larger act.
Idaho	Actually 2 bills: SB 1376 on Development of Regional Impact and Regional Benefit (67-1931 to 67-1947) and SB 1377 on Critical Areas (67-1961 to 67-1970). Package also included SB 1327 and SB 1434, both on planning commissions.
Iowa	Part of broad land use planning act.
Maine	Not part of broad act. Also has Public Law 535, Mandatory Shoreline Land Use Regulation.
Maryland	Part of broad land use act creating Department of State Planning and providing for State Development Plan.
Michigan	Part of broad land use act. Related acts: House Bill 4244, "Farmland & Open Space Protection Act": tax relief for farmers who agree not to develop; Shorelands Management and Protection Act of 1970 requires regulation of shorelands; proposed Urban Sprawl Control Act would ban power lawnmowers.
Minnesota	Not part of broad act. Related acts: Minnesota Statutes 1971, 462.381-462. 396 allows creation of regional development commissions (5); Minnesota Statutes 1971, 473 B, creates metropolitan council included among regional development commissions (5).
New York	Part of broad land use act. Amends laws allowing establishment of metropolitan, regional, or county planning boards and providing taxation to pay for them, to allow establishment of county, regional, and intermunicipal planning boards and provide taxation to pay for them (239b, 239c). Related acts: Wild, Scenic, and Recreational River Systems (1972); Adirondack Park Agency Act (1971). Also provides for county designation and regulation of areas of areawide or intermunicipal significance (3-103.2).
Oregon	Part of a package also including legislation on farms, subdivisions, a uniform building code, planning, and compensatory zoning. Act also provides for comprehensive plans (2).
Utah	Part of broad land use act.
Washington	Part of large act on land use planning. Amends other acts on airport zoning, planning agencies, ports, subdivisions, etc. Senate Bill 2620, also defeated, would have provided for long range policy formation. Also provides for local designation and regulation of landmark sites (special scientific, historical, archaeological, or architectural significance) and special preservation districts (same, plus scenic significance) (2-402 and 2-403).
Wisconsin	Department also prepares state land use plan, establishes data collection and analysis system, and coordinates land planning efforts; standards are to be coordinated with related state standards and regulations (16.951; 33.21).

The Maryland, Michigan, New York, Oregon, Washington, Wisconsin, Iowa, and Utah bills are all of this type. The California, Colorado. Florida, Idaho, Maine, Minnesota, and Arkansas critical areas acts are all separate pieces of legislation. The Idaho bills are part of a package including two acts which would require the creation of local planning commissions.

As for the relationship of critical areas laws to pre-existing development controls, California, Maine, and Michigan all have acts protecting shorelands. The California critical areas bill states that it will not affect the coastal conservation act. The two federal house bills, in a similar manner, state that their provisions do not supersede or conflict with the Coastal Zone Management Act of 1972. The Oregon act is part of a package of land use legislation which also includes laws concerning farms, subdivisions, a uniform building code, planning, compensatory zoning, and assessment for farmland (Michigan also has an interesting proposed law: the Urban Sprawl Control Act, which would limit the size of lots by banning power lawnmowers). Utah's bill has a clause repealing all conflicting laws.

J. CONSTITUTIONAL ISSUE

The critical areas bills were also studied as to whether they contain a clause intended to respond to the frequent criticism that land use legislation amounts to a taking of private property. As indicated in Table 10, most bills do include such a clause, usually in the form of a simple statement that the law is not to be construed as enhancing or diminishing the rights of property owners under the U.S. or state constitution. The opponents of HR 10294 and other bills claim that this statement is not enough, that there must be some provision for compensation of landowners whose development rights are restricted. From this point of view the Maine and Arkansas acts are most satisfactory. These do not permit any regulation of critical areas without acquisition of some financial interest in the land (the Arkansas act also states that the state Environmental Preservation Commission does not have the power of eminent domain). As far as the other laws are concerned, California and Oregon require further study of the compensation question, and the Model Land Development Code's unfinished. Article 6 is to deal with the compensation issue. The Utah State Land Use Commission must draw up a program to protect the rights of property owners and submit it to the legislature. (The Utah act contains a fairly long section about the importance of property rights to the people of Utah.) The federal Senate bill allows anyone having a legal interest in land whose use or development has been restricted or prohibited to petetion the courts to determine whether compensation is due, and, if so, how much.

Table 10

CONSTITUTIONAL ISSUE

ALI Model Code, Tentative Draft #3	Article 6, Compensation for Development Regulation, not yet finished.
Federal Land Use Policy and Planning Assistance Act of 1972 (S. 632)	Does not grant federal government any of states' constitutional or statutory authority to zone non-federal lands (512d); any person having a legal interest in land of which the state has prohibited or restricted the full use or enjoyment may petition a court of competent jurisdiction to determine if compensation is required, and if so how much (303b 2e).
Federal Land Use Planning Act of 1974 (H.R. 10294)	Does not enhance or diminish rights of property owners as provided by U.S. Constitution (106 d3).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Does not diminish rights of property owners as provided by U.S. Constitution and laws and Constitution and laws of state in which property is located (105 b3).
Arkansas	Commission does not have power of eminent domain (9b).
California	Not intent of Legislature to take private property for public use without compensation in violation of U.S. or California constitution (64902.8); Department to research possible method of compensation (64944).
Colorado	Does not enhance or diminish property rights as provided by U.S. or Colorado constitution; does not change laws concerning water rights (106-7-106).
Florida	Does not authorize government agencies to adopt regulations or issue orders that are unduly restrictive or constitute taking of property without compensation (8.1); if any agency has to acquire fee simple or other interest in land it must so certify to State Land Planning Agency, Board of Trustees of Internal Improvement Trust Funds, etc. (8.2); reasons for denial of development permit must be specified (8.3).
Idaho	None.
Iowa	Shall not be construed to deprive anyone of property without just compensation and due process of law as guaranteed by U.S. and Iowa Constitutions (31).
Maine	Landowner to be notified at least 60 days before inclusion of land in Critical Areas Register (3314.2); regulation to be done by government or other acquisition of property rights, or by management agreements (3314.3).
Maryland	None.
Michigan	Not to be construed as enhancing or diminishing rights of property owners under Michigan or U.S. Constitution (41.4).
Minnesota	Does not authorize unduly restrictive orders or regulations or taking of real or personal property (13.1); not retroactive (13.2).
New York	Inverse condemnation: if court finds restriction to constitute taking of private property, restriction may continue if compensation is paid (2-108). No compensation shall be paid for restrictions required to preserve public health, safety, and welfare (2-108).
Oregon	Legislative committee to study and make recommendations to legislature on compensation program (24). S.B. 849, not enacted, would provide for compensation.
Utah	Private property rights of fundamental interest to people of Utah, and land use policy must be structured within U.S. and Utah constitutional protection of rights (2). Along with plan and rules for critical areas and activities, Commission must submit proposed methods of protection of private property rights to legislature (7.1b).
Washington	None; but does not affect rights established by any treaty to which U.S. is a party (1-102).
Wisconsin	Legislative intent is that"all rights in private property should be preserved in accordance with the constitutions of this state and the United States" (Sec. 1).

New York has a provision relating to inverse condemnation. If a restriction on land use is found to constitute a taking of property, that restriction is not necessarily invalidated, but may continue in effect if compensation is paid. No compensation, the New York law adds, is to be paid for a restriction necessary to preserve the public health, safety, or welfare.

K. EXPERIENCE OR ANALYSIS

Again, this information is not available for all states (see Table 11), since the major source was material sent by states with copies of their bills. A more comprehensive study would include intensive legal research, interviews, and other activities beyond the scope of this effort. On the other hand, all the bills have been introduced since 1970, so that a limited amount of experience and analysis has been accumulated anyway.

Studying the background of these bills, it becomes evident that there is a good deal of opposition to land use legislation. Of the eight state and three federal "broad" land use acts (those which include both critical areas and other kinds of land use provisions):

- seven were defeated (Iowa, Michigan, Washington, Wisconsin, and the three federal bills);
- two passed after serious weakening (Maryland and Oregon);
- one passed but with enough opposition to require a referendum to be held (Utah); and
- one was apparently defeated but with some of its provisions adopted in later laws (New York).

The eight "pure" critical areas bills (those which deal only with critical areas) did better:

- four passed (Colorado, Florida, Maine, and Minnesota);
- one was still under consideration (California);
- one may have been either passed or defeated; information was not available (Arkansas); and
- two were definitely defeated, both in the same state (Idaho).

The most important reason for opposition to land use legislation is a fear that it will weaken individual property rights and the power of local governments to make land use decisions. This fear

Table 11

EXPERIENCE OR ANALYSIS

ALI Model Code, Tentative Draft #3	Draft includes much explanatory and illustrative comment.
Federal Land Use Policy and Planning Assistance Act of 1972 (S.632)	Passed in Senate, defeated in House.
Federal Land Use Planning Act of 1974 (H.R. 10294)	Defeated; major objection: dangerous to individual property rights and states' rights (Report of Committee on Interior and Insular Affairs, Together with Additional, Dissenting, and Minority Views).
Proposed Substitute for H.R. 10294 (H.R. 1135)	Defeated; regarded as acceptable by most objectors to H.R. 10294 (Report of Committee on Interior and Insular Affairs, Together with Additional, Dissenting, and Minority Views).
Arkansas	None.
California	Council of State Governments, Report on Areas of Critical Environmental Concern says: not enough about social and economic considerations; requires coordination of existing environmental programs.
Colorado	None.
Florida	Council of State Governments, Report on Areas of Critical Environmental Concern, says: needs data base and evaluation of statewide condition; 5% ceiling on critical areas inadvisable; environmental models in regional plans needed; deals with immediate situation with reduced capacities to consider long-range perspective.
Idaho	Defeated by one vote; no analysis available.
Iowa	Defeated; no analysis available.
Maine	None.
Maryland	Land Use Planning Reports (15 April 1974) says weakened just before passage in that state power to regulate critical areas deleted. Maryland Department of State Planning, Land Use Planning in Maryland, gives history and analysis of State Land Use Plan.
Michigan	Defeated by one vote, according to sponsor because of lobbying by Michigan Real Estate Association; possibly influenced by defeat of federal bill (LUP Reports, 1 July 1974).
Minnesota	None.
New York	Council of State Governments, Report on Critical Areas, reviews computerized Land Use and Natural Resources Information System and says too broad for use by local governments.
Oregon	Little, Charles E., The New Oregon Trail gives history: much weakened before passage. Original bill listed state and federal parks, recreation areas, any land on seaward side of Coastal Highway, and tidal flats along Columbia from mouth to the Dalles among critical areas; and construction of airports, state and federal highways, nuclear and thermal power plants, and transmission lines for gas, oil, and electricity among activities of statewide significance; control system for critical areas deleted.
Utah	None.
Washington	Defeated; no analysis available.
Wisconsin	Bill based on recommendations of Land Resources Committee; encountered "strong" opposition and did not pass (status report from State Planning Office, August, 1974).

killed HR 10294, as shown by the Report of the Committee on Interior and Insular Affairs and the proposed substitute bill. This factor weakened the Oregon law (see Charles E. Little, The New Oregon Trail) and possibly the similar Maryland law. It may have been responsible for the five percent limit on the amount of Florida land which may be considered "critical." The defeat of HR 10294, in turn, is though to have influenced the defeat of at least the Michigan bill.

The Council of State Government's report on areas of critical environmental concern[99] contains analyses of the legislative programs of four states. The California act is criticized for not paying enough attention to social and economic concerns and for not coordinating existing environmental programs. The Florida program is faulted for lacking a good data base and an evaluation of the condition of the state as a whole, for dealing with the immediate situation instead of the long-range perspective, and for its five percent ceiling on critical areas. (Most of these criticisms might apply to other critical areas legislation.) New York is criticized for supplying its local planning agencies with information too broad for them to use. Wisconsin is praised for developing a technique for evaluating the relative criticality of resource areas, although it is pointed out that any such evaluation will be based on some non-objective judgments and is consequently open to objection.

L. CONCLUSIONS

It is difficult to make recommendations for a Rhode Island critical areas law based on the acts of other states and the federal government. One reason is that critical areas legislation is very recent, so there has been little opportunity to observe its strengths and weaknesses. Second, each state's legislative program must reflect its own goals, needs, and characteristics. Conclusions about the most common provisions, however, should at least suggest a possible basis for a Rhode Island bill.

With regard to agency structure, there is much departure from the Model Land Development Code's prescribed group of agencies: a state land planning agency in the Governor's office, optional regional planning divisions, local land development agencies, optional state and regional advisory commissions, and a land development adjudicatory board. Although most states already have planning agencies, not necessarily in the Governor's office, there is a definite tendency to create a new agency -- a land use commission if the state has a planning agency, a new planning agency, if it does not -- to perform the additional functions required by the act. Maryland does not create a new agency, but neither does it provide many new powers. Bills usually call for either state advisory councils composed of citizens or local government officials, which would be required under anyone of the federal bills, or citizen representation on the Land Use Commission. Only two states,

Florida and Wisconsin, establish a land development adjudicatory board. The existence of local or regional planning agencies depends on the size of the state, its present administrative structure, and the amount of local involvement in land planning. Rhode Island, the smallest of the states, has traditionally had considerable local involvement, but at the city and town rather than the county or regional level.

The relationship between the state and the local governments is one of the most important issues in critical areas legislation. Its resolution depends on the state's traditional handling of related questions and on the degree of power which the state wants and is able to obtain in its land use legislation, which, other things being equal, tends to be proportionate to the amount of development pressure in the state.

The definitions of critical areas vary. Some states include only critical resource areas; some, both critical resource areas and areas surrounding key facilities. Critical resource areas are generally agreed to include areas of scenic, historic, and ecological importance; about half of the states, having made some such definition, go on to give more specific examples. Key facilities usually include public facilities tending to induce development of more than local impact and, often, facilities for the development and transmission of energy.

All but three of the states which regulate critical areas also regulate developments of greater than local impact. Definitions of "development of greater than local impact" also vary. Some states identify developments by type; some, by such characteristics as size and location or by effects. Those which do not include key facilities with critical areas include them here.

Most often, critical areas are designated by the state planning agency or land use commission. In only one state, Colorado, are they designated by local governments. Suggestions, however, may be made by local governments and others. Some laws specify this, and Maryland and Utah require local governments to suggest critical areas. In a few cases designations must be confirmed by the legislature.

If development of more than local impact is not clearly defined by the act authorizing its regulation, usually the state planning agency adopts criteria for its identification. In Wisconsin, the Land Appeals and Review Board must hold a hearing and advise the State Planning Office before standards are adopted.

As for regulating critical areas, the most common procedure is that local governments are required to adopt regulations pursuant to state guidelines. If localities fail to do so within a given time period, the state has authority to impose its own regulation. If local governments fail to enforce the regulations, only four states provide a remedy: the states may sue the delinquent local governments. Almost all states require permits, to be issued by the local governments, for development in critical areas, and some acts allow either the state or a local government to seek an injunction against anyone who develops without a permit. Wisconsin provides for appeals by certain parties.

The process for regulating development of more than local impac varies so much from state to state that it is impossible to make any generalizations, except that it often resembles the process for regulating critical areas.

Almost all the acts include a brief statement that they are not intended to diminish property rights. Only two (Maine and Arkansas) however, provide any substantial program to protect property rights. Three acts do provide for the study of a program of compensation for landowners whose use of their property has been unduly restricted

Half of the state critical areas acts, all three federal bills, and the Model Land Development Code include other land use provisions, such as requiring land use planning, coordination, and so forth. The other half of the state acts deal only with critical areas regulation. Information is not readily available on other land use laws which are related to these acts.

PART FOUR: RECOMMENDATIONS

The American Law Institute's Model Land Development Code was developed to aid states in developing land use systems. It is drawn broadly and comprehensively in order to provide the state with ample classifications and mechanisms from which to choose. The recommendations presented in this paper draw from the Model Code, but they are made only after reviewing the ways in which other states have dealt with the critical area concept (often broadly based on the Model Code also) and only after reviewing regulatory structures in Rhode Island dealing with possible critical areas.

This proposed method for the regulation of critical areas of statewide concern is therefore unique in many ways. The problem is a complex one, and there is by no means only one solution to it. The recommendations are broadly stated in order to allow for flexibility of application in the future. There is a need for considerably more study in this area before a comprehensive proposal can be submitted in the form of legislation. This report is intended to be a preliminary attempt to analyze the concept of critical area regulation in terms of Rhode Island's needs and expressed policies.

It should also be emphasized, as stated in the Preface, that this proposal for critical areas regulation should be linked with a broader land management program.

For the purposes of this study, the critical areas approach was isolated, but it should form an integral part of more comprehensive state development legislation.

A. SCOPE OF CRITICAL AREAS LEGISLATION

It is obvious that the term "critical area" is an all encompassing one. Critical areas legislation refers to legislation which gives state regulatory power over certain areas in the state, as well as over certain types of development, where it is determined that greater and more uniform control than that currently exercised by local government is needed. These land uses would include districts of critical state concern, as well as key facilities, developments of regional impact, developments of regional benefit, and large-scale development. The use of the word "critical" both for the overall designation and for the specific designation of districts of critical state concern is confusing. A district of critical state concern, in the Model Land Development Code sense, include areas affected by or having a significant effect upon an existing or proposed major public facility; an area containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance; and proposed

sites of new communities designated in a State Land Development Plan. Some states also include key facilities in this designation of districts of critical state concern.

In reviewing the Model Code and the state and federal acts in this report, it has been necessary to use the terminology of the Code. For the purposes of the recommendations section of this report, however, the term "critical areas" is a broad classification referring to all areas and types of development in the state where a state role is needed in the regulatory process because local government control cannot sufficiently reflect the state interest in the area or development in question. In terms of specific classifications, the term "resource areas of statewide importance" will be used to designate an area containing or having a significant impact upon historical, natural, or environmental resources of statewide importance. This would include, for the critical areas suggested for Rhode Island in Part Two, coastal areas, fresh water wetlands, historical areas, and conservation areas. The term "key facility areas" will be used to describe those public facilities and surrounding area which provide public services to a community larger than the jurisdiction of the municipality in which they are located. This includes, of those suggested critical areas, water supply areas, highway interchanges, airport environs, public transportation facility areas, and public utility areas. Finally, the term "developments of statewide impact" will be used to describe those developments which, because of their magnitude or type, have an impact on an area greater than the jurisdiction of the municipality in which they are located. This impact can be in terms of traffic congestion, greater need for public services, air pollution or noise pollution, likelihood of generating additional development, or size of the site or number of persons likely to be present on the site. This classification would therefore include large-scale commercial, residential, and industrial developments, both private and state assisted.

B. CREATION AND ORGANIZATION OF A LAND USE COMMISSION

1. Land Use Commission

Having described the three sub-classifications under the general classification of critical areas, the next step is to develop a system to regulate these areas. The scope and uniqueness of such a system, in relation to existing state agencies, warrant the creation of a new state commission to deal with regulation of critical areas. This Land Use Commission would be set up as an independent agency in the state organizational structure. It would be separate because its functions and duties would be different from those of any existing agency and because many of its functions would require it to have a viable working relationship with other state agencies. If other agencies are to recognize its authority and role in state government the proposed Land Use Commission needs to be at least on an equal footing with these agencies.

The land use agency should take the form of a commission or council, for at least two reasons. First, this form has already been used for a number of agencies within the state such as the Historical Preservation Commission, the Coastal Resources Management Council, the Water Resources Board, the Public Utilities Commission, and, of course, the State Planning Council. The above-mentioned commissions, councils, or boards will each have a significant interest in the activities of the Land Use Commission. Secondly, the commission form, with its mix of legislators, local officials, citizen appointees and state department heads represents a cross section of the state in terms of geography and government as well as provides the variety of different perspectives and points of view needed in any innovative land use control system.

The Land Use Commission would be composed of fifteen members. The number fifteen was arrived at because of the need for an odd number of members to avoid tie votes, and it is the minimum number possible which still includes the necessary individuals. The Commission would consist of three public members, appointed by the Governor; two local government officials, chosen by the Rhode Island League of Cities and Towns, a statewide organization of local government officials, or by the Governor if the League did not act within 90 days; three state legislators, two of whom would be state representatives (one from each party, chosen by the majority and minority leaders) and one, a state senator, chosen by the majority leadership of the State Senate; and the last seven positions on the Commission would be occupied by the heads of state agencies which have an interest in the various critical areas. In Rhode Island, these members would be: the Director of the Department of Natural Resources, the Director of the Department of Health, the Chairman of the Historical Preservation Commission, the Chairman of the Coastal Resources Management Council, the Chairman of the Water Resources Board, the Chairman of the Public Utilities Commission, and the Director of the Department of Economic Development. The ways in which the powers and duties of these agency heads relate to critical areas have been discussed in detail in the section of this paper dealing with suggested critical areas for Rhode Island. Membership on the Land Use Commission could be expanded if it were felt that more legislators, local officials, or private citizens were needed or if the critical areas were expanded to include an area in which another state agency had an interest. However, the smaller the Commission, the more effective it would probably be.

The members of the Land Use Commission should be paid a nominal sum for every meeting, if they are not being otherwide compensated. For example, the director of a state department should not be paid for being a member of the Commission, since membership would be one of his duties as director. On the other hand, private citizens should be compensated for the time they spend on the Commission's business. A sum of fifty to one hundred dollars per meeting would

be adequate compensation, the payment being conditioned upon attendance.

The Land Use Commission would, of course, need a staff to carry out its functions. There are basically three activities in which a Land Use Commission would be involved: planning, administration, and enforcement.

2. Planning Staff

The planning is probably the most important area of the three. The planning staff would first have to define the types of critical areas. The legislation setting up the Land Use Commission would have to provide some guidelines as to what would be a critical area. However, these guidelines should be as broad and non-specific as possible. The act must, of course, be specific enough to avoid a legal challenge on the grounds that the powers of the Land Use Commission are an excessive delegation of legislative authority, but the act must not unduly presuppose the definitions and extend the power of the Commission to such a broad area that specific control is impossible. The act must therefore state general guidelines for critical areas where the Commission's power is to be exercised, but it must also give the Commission authority to define these areas in as specific terms as possible. For example, the act might mention significant natural features as a critical area of statewide concern. In order to exercise any effective control, there is a need to define specifically what is a significant natural feature, or preferably to identify and map every such feature where land use control is needed. Specificity is more difficult in dealing with developments of statewide or regional impact since these cannot be mapped or defined conclusively in terms of characteristics; a development may be planned, in the future, which has none of the elements in the definition but which nevertheless has statewide impact. However, here again the act must be drawn in general terms, citing factors for consideration in determining developments of statewide impact, while leaving precise definitions to be adopted by the Commission so as to clarify for owners, developers, and local government officials what is, or could be, a development of statewide impact. The task of drawing up these specific definitions or mapping these specific areas therefore requires a professional staff with the necessary technical skills. For providing this staff, two alternatives are possible. The first is to recruit the planning staff necessary to complete the task, and to hire private consultants when technical expertise is necessary in an area for only a short length of time. The second alternative is to make use of an existing state planning agency. Of these two alternatives, this paper takes the position that the latter is preferable. In Rhode Island the Statewide Planning Program, under the general supervision of the State Planning Council, is the principal staff agency of the executive branch for coordinating plans for the comprehensive development of the state's human, economic, and physical resources. It has developed a state land use plan, this report

being an outgrowth of one part of that plan. The Statewide Planning Program has a full-time staff of about 35, including planners and supporting staff. The Statewide Planning Program would, of course, need to be expanded considerably to deal with the increased workload attendant with the implementation of statewide regulation of critical areas, but the planning framework and mechanism would already exist. The Statewide Planning Program not only can provide appropriate staff but also has, with its "Environmental Inventory," much of the data needed for critical areas planning. To establish another land planning division within the state would be a needless duplication of staff and data gathering. Any plans or recommendations put forth by the Statewide Planning Program would, of course, be subject to review and approval by the Land Use Commission. The two agencies would therefore need to have a close working relationship.

The major argument against having the planning of the Land Use Commission performed by a separate agency is the lack of immediate contact between those doing the planning and those implementing the plan. From a certain perspective this criticism is valid, but it can be countered by the argument that, while understanding of the problems involved in implementation is important, the planning process should be somewhat detached and not a reaction to day-to-day problems which arise in implementation. Since planning, administration, and enforcement are three distinct operations, it is not essential that they all be housed under the same roof. The bureaucratic delay which may result from the conveyance of plans from the Statewide Planning Program to the Land Use Commission would not necessarily impede the effectiveness of critical area regulation, but could instead insure thoughtful consideration and review of proposed plans and guidelines.

3. Administrative and Enforcement Staff

The effectiveness of the Land Use Commission will depend not only on planning but also on administration and enforcement. Conveying the guidelines and procedural requirements from the Land Use Commission to the local governments and acting to insure that these guidelines and procedures are being properly administered requires a staff which can speak for the Land Use Commission. Indeed, since the Land Use Commission will meet only periodically to make policy decisions, its administrative and enforcement staff will, in effect, function as the state land use regulatory agency. These two parts of the staff should therefore be responsible only to the Land Use Commission. Since the functions of administration and enforcement are more closely related to each other than they are to planning, it is more forseeable that these two staff sections should be housed together. Finally, administration and enforcement are more ongoing than is planning, for, while plans must be updated from time to time, after the initial planning is completed the need for a large planning staff will abate. This forseeable fluctuation in the planning manpower needs is a further reason to vest in the

Statewide Planning Program the responsibility for critical area planning, while creating an independent Land Use Commission staff for purposes of administration and enforcement. The scope of the duties of each of these three staff sections will be more apparent in the discussion of the actual methods of controls of the Land Use Commission.

C. AUTHORITY OF THE LAND USE COMMISSION

As previously mentioned, this proposed Rhode Island Land Use Commission will be dealing at the state level with three kinds of land use: the resource areas of statewide importance, key facility areas, and developments of statewide impact. Of these three areas the first two, that is, resource areas and key facility areas, are similar in that both can be defined specifically, leaving little question whether a certain tract of land contains a resource area of statewide importance, or whether a proposed or existing use of land involves a key facility. However, the third area of concern, the developments of statewide impact, are more difficult to define specifically, for reasons previously mentioned. This discrepancy in the ability to define the three different areas of concern creates regulatory problems. If it is not clear what areas are to be regulated, then it is at least equally difficult, if not impossible, to draw up specific guidelines for the regulation of those areas. This means that some discretion must be used by the regulating officials as to what areas are to be regulated and how. The questions then arise of who is to have this discretionary power, the local officials or the state Land Use Commission, and further, of how far this power should extend. Clearly, it is preferable that non-elected public administrators, both state and local, have as little discretionary power as possible, in order to minimize the possibility of abuse of that power. Policy decisions should be made by the state legislature or, if purely local in nature, by local elected officials. If that is not possible, then they should be made by a body designated by the legislature or local elected officials to make such decisions. The lower down this chain of command the policy decisions take place, the more likely that it will be an unlawful delegation of legislative power. It is therefore desirable in any land use control system that administrative discretion be eliminated whenever possible, and, when it is not possible, that such decisions be made as high up the so-called chain of command as possible.

The regulatory powers and duties of the Land Use Commission should be viewed in terms of these basic concepts. For resource areas of statewide importance and for key facility areas, it is possible, with a directive from the legislature as to what is meant by these areas, to define them precisely and to draw up specific standards for their regulation, subject to the approval of the Land Use Commission, the agency designated by the legislature to

carry out this function. Once this regulatory plan is adopted, very little discretion is needed in implementing it. More discretion is needed, of course, in regulating developments of statewide impact, and therefore a somewhat different process is needed, keeping in mind that discretionary judgments should be made at as high a level as possible; i.e., by the Land Use Commission itself.

The remainder of this paper will focus on these two, somewhat different methods proposed for the statewide regulation of critical areas. The specific categories to be included within each type of critical area will not be discussed further. Suggestions of possible critical areas have already been made in a previous section of this paper, and it will be for the legislature to determine broad categories and for the planning staff of the Land Use Commission to propose specific definitions.

1. Regulating Resource Areas and Key Facilities

The regulation of resource areas of statewide importance and the regulation of key facility areas can be carried out under the same regulatory procedure. This is because resource areas such as fresh water wetlands, historic areas, and conservation areas can be specifically defined and inventoried. Key facility areas such as highway interchanges, water supply areas, and airport environs can also be very specifically defined and existing ones can also be mapped. A regulatory procedure can therefore be devised which will leave little doubt as to what areas will fall under the regulations and how they will be controlled.

The legislature should list in the critical areas legislation criteria for areas to be controlled as resource areas of statewide importance and as key facility areas. Care should be taken in drafting such legislation and subsequent regulations to ensure that the definitions are not too narrow to cover all of the areas which may need control. For example, the peat requirement in defining an intertidal salt marsh in the Rhode Island Intertidal Salt Marsh Act could be viewed as an overly restrictive definition. "Key facility" should also be defined as clearly as possible by the legislature without unduly restricting the scope of the act. This is, of course, a difficult drafting task, but one which is crucial to the effectiveness of the act. As a guidepost, the drafting of such legislation and regulations should consider previous legislative definitions of critical-type areas and should analyze these previous definitions in view of the problems encountered in their implementation and in view of the different aims, if any, of the critical areas legislation. For example, the Water Resources Board's definition of a water supply area is a useful starting point for developing a definition of a water supply area as a critical area, but it should be realized that the Water Resources Board is concerned chiefly with water quality and quantity and that

the land use of the adjacent areas is only considered in those terms. The critical areas legislation has a broader view of water quality and quantity, as it relates to land use, and therefore the definition should be reconsidered carefully.

Once the legislation is passed and general criteria established, it becomes the task of the Land Use Commission, specifically the planning arm of the Land Use Commission, to determine specifically what areas are to be regulated as resource areas of statewide importance and as key facility areas. These designations should be site-specific if at all possible. Recommendations should be considered from the local governments, state agencies, public and private organizations, and private citizens as to areas which might meet the general criteria for critical areas set forth by the legislature. The Land Use Commission would receive these recommendations and forward them to its planning arm, the Statewide Planning Program. The Statewide Planning Program would take the recommendations, along with its own data, including the state's "environmental inventory," and make recommendations to the Land Use Commission as to specific areas which should be regulated as resource areas of statewide importance or as key facility areas. Along with these specific recommendations as to areas would be detailed guidelines as to type of controls needed. These guidelines might specify the types of land use to be permitted in these various critical areas or the types of control which might be necessary to insure that only appropriate land uses occur.

The Land Use Commission, having received this advice from the Statewide Planning Program, would then hold hearings on this regulatory plan. The hearings would enable all interested parties to review the plan and to suggest changes. Interested parties would include local governments, landowners whose property might be classified as critical areas, interested state agencies, and any public or private organizations within the state which might have an interest in critical areas, such as the Audubon Society of Rhode Island, Ecology Action, and the Chamber of Commerce, among others. Affected landowners, local governments, and state agencies controlling land which might be regulated should, of course, receive written notice of the hearings, setting forth the date and place. Notice should also be published in the newspaper of the area where the land in question is situated. There should be hearings in various areas throughout the state to insure that everyone with an interest might be heard. The Land Use Commission, with the Statewide Planning Program staff, would then consider the suggested changes and make the final determination as to areas to be included and standards for control. The local government where one or more critical area is located would then have a certain time period to develop land use regulations pursuant to the Land Use Commission standards. The local government should have some flexibility in

determining how to regulate the land use of critical areas in order to comply with its own comprehensive plan or zoning ordinance. At the end of the specified time period, if the local government does not submit existing or new regulations for critical areas to the Land Use Commission for review, or if the regulations are found to be not in compliance with the standards of the Land Use Commission, as determined by the Land Use Commission, then the Commission would have a certain time period in which to establish its own regulations and the municipality would have to administer these regulations as its own. If the Land Use Commission did not act within this period, then the critical area classification of the area or areas in question would be dropped.

If, after the adoption of critical area regulations or the imposition of regulations by the Land Use Commission, the enforcement division of the Land Use Commission determines that local officials are not acting pursuant to these regulations, the Commission may ask the Attorney General's office to seek an injunction against the local officials and the municipality. Further violation of such injunctive order, if granted, would make the violator liable for criminal contempt penalties set forth by the legislature in the act. Such penalties should be, at a minimum, one hundred dollars and/or 30 days in jail.

The enforcement division of the Land Use Commission would be able to monitor local government regulation of critical areas through a monthly report filed by the local government detailing all requests for permits involving critical areas and the actions, if any, taken on the requests. In addition, spot checks of local activity could be carried out by the Commission's enforcement staff.

Appeals from local decisions regarding the regulation of resource areas of state importance or key facility areas could be taken pursuant to the procedures set forth in the state's zoning enabling act, if the person challenging the decision has standing as prescribed in the act. If the question is one of improper administration by the local government, a complaint could be filed with the Land Use Commission by any interested party; and after investigation the Land Use Commission, through the Attorney General, could seek an injunction holding up the permit approval pending final determination by the court of improper administration. Existing state overrides of local zoning power, such as the Public Utilities Commission's authority, would be subject to review by the Land Use Commission, if a critical area were involved, as it probably would be if areas involving public utilities were adopted as a type of key facility area. There would be a duty on the part of the overriding agency (e.g., the Public Utilities Commission) and the local government to report such an override to the Land Use Commission.

During the interim period between the effective date of the critical areas act and the adoption of regulations (during the preparation of designations and standards by the Statewide Planning Program and their final approval, and then the period for the local governments to adopt regulations, and the following period for the Land Use Commission to act if the local government fails to do so), there is need for some regulation of these critical areas to prevent their destruction. This interim period would probably be at least one year and possibly as long as two years. During this time a moratorium on all development could be declared, but this action would cause undue hardship to landowners and to the economy of the state. Instead, a three month moratorium should be imposed on all development within areas which are potential critical areas as defined by the legislation. The Land Use Commission would be able to grant exceptions where undue economic hardship would result from delay, such as with the contruction of a water supply or public utility facility immediately needed by the community. After this three-month period, preliminary designation of critical areas would be proposed by the Statewide Planning Program and adopted by the Land Use Commission. This preliminary designation would mean that any proposed alteration or development of a resource area or key facility area would have to be submitted to the Land Use Commission for approval. This would, of course, mean a great deal of work for the Commission in its early stages. However, this burden might be lessened by requiring review only after the local government grants a permit for the development or alteration (preliminary standards could also be drafted to guide local governments in their decisions) If a request for a permit were denied during this interim period, then the request could be made again once the permanent regulations took effect and the permanent critical area designations were made.

2. Regulating Developments of Statewide Impact

As previously stated, there are different problems involved in regulating developments of statewide impact. First, such developments cannot be specifically named and mapped. Secondly, the determination of what is a development of statewide impact can never be an exact science, and decisions will always be questionable depending upon one's point of view. Finally, a development of statewide impact, while possibly providing a net benefit to the state, could produce a net detriment to the municipality, and therefore local officials may be reluctant to enforce the regulations. Therefore, a regulatory scheme must be devised which will be specific enough to make clear its extent, but broad enough to include the necessary activities. It must fully allow the state interest to be heard, as well as local and private interests which may be affected. Lastly, there must be an effective review of local decisions to insure that local interests do not supersede the interests of the people of the state as a whole, where a sufficient state interest is shown.

The task of drawing up standards and regulations for developments of statewide impact could also be assigned to the Statewide Planning Program. These standards, based on criteria in the legislation, would be adopted in the same manner as for the other critical areas; that is, after hearings at which all interested parties have a chance to express their views. For the purposes of regulating developments of statewide impact, the term "interested parties" would include local governments, state agencies interested in development, quasi-state authorities and corporations, private organizations interested in development, and anyone who requests the Land Use Commission to put his name on a list of interested parties.

After standards and regulations are adopted by the Land Use Commission, the local governments would again have a certain time period in which to incorporate these standards into their permit-granting procedures. If they fail to do so, then the Land Use Commission would be able to impose standards. There should be no time limit on the Land Use Commission's power to impose standards since it is necessary for the entire state to follow this procedure, or the control system will lose its effectiveness.

The interim procedures would parallel those for the other critical area controls. Preliminary standards would be adopted after a three-month moratorium. Any request for a development permit which might be subject to the standards would have to be reviewed by the Land Use Commission regardless of local action, and any request which was denied could be re-submitted after the adoption of permanent regulations.

After a municipality has adopted the Commission's standards as part of its development permit granting procedure, upon receiving a request for a development which may have statewide impact, local officials would notify the Land Use Commission that such a request is pending. If the local government or the developer were unsure whether a development is of statewide impact, they could request in writing an advisory ruling by the Land Use Commission, and this ruling would have to be provided within a specified time and would be binding upon all parties.

Upon receiving notification of a permit request for a development of statewide impact, the Land Use Commission would notify those on the interested parties mailing list, as well as local officials in adjacent communities, of the application and any hearing dates which have been set. The Land Use Commission's administrative staff would then review the application and make a recommendation to the local government. Such recommendations would not need to be followed by the local government but would be only advisory in nature. The final hearing date by the local government would be at least 20 days after the mailing of notice of the application to the Land Use Commission.

After the local government makes its final determination on the request for a development permit, notification of that decision would be mailed to the Land Use Commission. The Land Use Commission would then notify all interested parties on the list of the decision. The local government would notify, by registered mail, all parties who had expressed (in writing) interest in the outcome of the permit request in question. An appeal of the local government's decision would have to be filed with the Land Use Commission within 20 days after the local government mailed notice of the decision to the Land Use Commission and to all parties expressing an interest, in writing, in the outcome. Any permit granted would not be effective until this date. An appeal could be filed by any aggrieved party, by any party on the interested parties list, by any party who had requested notification from the local government, by any participant in the local hearings on the matter, or by any state agency. The Land Use Commission could dismiss any appeal deemed not to be a matter of public interest. This dismissal power would be exercised only when the appeal request clearly would serve no public interest.

If the Land Use Commission finds that the local government has not properly weighed the benefits and detriments to the state and the benefits and detriments to the municipality, then it could overturn the local decision. Factors for evaluating benefits and detriments would have to be spelled out in the statute or in regulations. A judicial appeal of the Land Use Commission's decision could be taken through the Administrative Procedures Act, and a temporary injunction could be sought pending the outcome of that appeal.

3. Dual Jurisdiction

The jurisdiction of the Land Use Commission would extend to all critical areas and activities set forth in its legislation. If there is another state law or state agency already controlling the area or activity in question, such as land under the jurisdiction of the Coastal Resources Management Council or areas controlled by the Fresh Water Wetlands Act, then there would be dual jurisdiction, and all necessary procedures would have to be followed in order to develop or alter the area. If there are conflicting regulations, then the most stringent would apply. Exceptions to this general rule could be set forth in the statute. In the case of the Coastal Resources Management Council, the Council would have jurisdiction over development below the mean high water mark; the Land Use Commission would have jurisdiction above mean high water; and both agencies would have jurisdiction for those specified land uses and activities over which the Council now has authority (see Part Two-A).

D. CONCLUSION

This critical areas legislation is intended to prevent the destruction and deterioration of areas important to all Rhode Islanders, while insuring that development of benefit can occur. The legislation would provide the state with an effective tool for managing the growth of Rhode Island to the benefit of all Rhode Islanders and for preserving their natural, cultural and historic heritage.

FOOTNOTES

1 Jeremy Bentham, quoted by John E. Cribbet, "Changing Concepts in the Law of Land Use," 50 Iowa Law Review 245.

2 In re Estate of O'Connor, 126 Neb. 182, 252 N.W. 826 (1934).

3 David Heeter and Frank Bangs, "Local Planning and Development Control: One Bad Apple Spoils the Barrel," 1971 Land Use Controls Annual 27, @ 29.

4 Chapter 205 (1961), Laws of Hawaii.

5 Results of questionnaire reprinted in Land Use Digest, No. 2, Vol. 7 (February 27, 1974), published by the Urban Land Institute, Washington, D.C.

6 Rhode Island Statewide Planning Program, Goals and Policies Questionnaire: Methodology and Analysis of Responses, Technical Paper Number 43 (Providence, Rhode Island: 1974).

7 The American Law Institute, Model Land Development Code, Tentative Draft No. 3 (April 22, 1971), Articles 7, 8, and 9, p. 5.

8 Pennsylvania Coal Co. v Mahon, 260 US 393 (1922).

9 Edited version of speech by Jon Kusler, Esq., at the National Symposium on Resource and Land Information, Reston, Virginia, November 7-9, 1973.

10 Jackvony v. Powell, 67 RI 218, 21 A 2d 559 (1941).

11 State v. Cozzens, 2 RI 561 (1850).

12 Coastal Resources Management Plan, May 30, 1973, p. 8.

13 Malcolm J. Grant, Evolving Patterns of Coastal Use in Rhode Island (Kingston, Rhode Island: Coastal Resources Center, University of Rhode Island 1973).

14 Ibid., p. 21.

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16 Ibid.

17 Correspondence to Patrick Fingliss, Statewide Planning Program , from Phil Tabas, New England River Basins Commission.

18 Department of Natural Resources reply to suggestions of New England River Basins Commission, Inter-Departmental Communication from Calvin Dunwoody, Department of Natural Resources, to Bradford Southworth, Statewide Planning Program, June 20, 1974.

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21 49 Stat. 666, 16 USC 461.

22 American Society of Planning Officials, Planning, Vol. 40, No. 6, (July 1974), pp. 7-15.

23 General Laws, Section 42-17.1-2.

24 General Laws, Section 42-17.1-4.

25 General Laws, Section 32-2-2(a).

26 General Laws, Section 32-4-3.

27 Letter dated January 3, 1973, from Philip W. Noel, Governor of Rhode Island, to Maurice D. Arnold, Regional Director of the Federal Bureau of Outdoor Recreation.

28 General Laws, Section 42-45-1.

29 General Laws, Section 45-24.1-1.

30 General Laws, Section 45-24.1-1.

31 General Laws, Section 45-24.1-4.

32 General Laws, Section 45-24.1-4.

33 General Laws, Section 45-24.1-5.

34 General Laws, Sections 45-24.1-8 to 45-24.1-13.

35 General Laws, Section 42-45-2, as amended.

36 Rhode Island Water Resources Board, Public Water Systems (March, 1971), p. X.

37 General Laws, Section 46-15-1(c).

38 Acts and Resolves of Rhode Island, April, 1915, Chapter 1278.

39 General Laws, Section 46-15-2.

40 General Laws, Section 46-15-6(a).

41 General Laws, Section 46-15-6(b).

42 General Laws, Section 46-15-6(c-h).

43 General Laws, Section 46-15-7.

44 General Laws, Section 45-24-4.3.

45 J. B. Mason and C. T. Moore, Studies of Optimal Models of Interchange Development through Land Use Regulation and Control, Alabama Highway Research, HPR Report No. 72A, Research Project 960-070 (August, 1972), p. 237.

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47 A Manual for Interchange Area Planning, Pennsylvania State Planning Board (June 1963), p. 12.

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56 General Laws, Section 1-3-1.

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65 General Laws, Section 42-13-1.

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75 Ibid.

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78 General Laws, Section 45-24-4.3.

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83 General Laws, Chapter 37-19.

84 General Laws, Chapter 42-63.

85 General Laws, Section 42-63-2(d).

86 General Laws, Section 46-23-6.

87 American Law Institute, A Model Land Development Code, Section 7-201-3b.

88 HR 10294, Section 412 a.

89 Hon. Robert E. Bawman, "Dissenting Views," in Report of the Committee on Interior and Insular Affairs, House of Representatives, Together with Additional, Dissenting, and Minority Views, To Accompany H.R. 10294., p. 99.

90 HR 10294, Section 412h.

91 Idaho Code, 67-1941. Other states have similar provisions.

92 Idaho Code 67-1931.

93 S 632, Section 501g; the wording in the two House bills is slightly different.

94 Florida Environmental Land and Water Management Act, Section 6.1.

95 Model Land Development Code, Section F-404.1.

96 H.R. 10294, Section 412j.

97 Maine Act for a State Register of Critical Areas, Section 3312.2.

98 Florida, Section 6.1.

99 Urban Studies Center, University of Kentucky, Report on State of the Art for Designation of Areas of Critical Environmental Concern, prepared for the Council of State Governments (1974).

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